TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 299

THE CHAS. WOLFF PACKING COMPANY, PLAINTIFF IN ERROR,

vs.

THE COURT OF INDUSTRIAL RELATIONS OF THE STATE OF KANSAS

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

FILED FEBRUARY 26, 1924

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[fol. 1] CAPTION—Omitted

[fol. 2] **IN SUPREME COURT OF KANSAS**

No. 23702

THE COURT OF INDUSTRIAL RELATIONS OF THE STATE OF KANSAS, Plaintiff,

vs.

THE CHARLES WOLFF PACKING COMPANY, Defendant

MOTION

For a rehearing and for a modification of the judgment entered upon the motion of the plaintiff to spread the mandate from the Supreme Court of the United States and to modify judgment and on the motion of the defendant to spread the mandate of the Supreme Court of the United States upon the record and to enter judgment pursuant thereto

Comes now the Court of Industrial Relations of the state of Kansas, plaintiff in the above-entitled cause, and moves the court for a rehearing and a modification of the judgment entered upon the motion of the plaintiff to spread the mandate upon the record, from the supreme court of the United States, and to modify the judgment of the supreme court of Kansas, and upon the motion of the defendant to spread the mandate and record the judgment of the supreme court of the United States and to enter judgment pursuant thereto.

The grounds of said motions are as follows:

This court, in its judgment upon said motions, ordered that a peremptory writ of mandamus issue, commanding the defendant to put into effect the following parts of the order of the Court of Industrial Relations of the state of Kansas, to wit:

"3. A basic working day of eight hours shall be observed in this industry; but a nine-hour day may be observed not to exceed two days in any one week without penalty.

[fol. 3] "14. Workers paid by the week or day, if employed within the plant and not within the office or sales department, shall be subject to hours of work * * * as others employed.

"19. In departments operating twenty-four hours a day and seven days a week, each employee therein shall be entitled to one day off each week.

"This order shall * * * continue in force until changed by the court (the Court of Industrial Relations) or changed by agree-

ment of the parties with the approval of the court (the Court of Industrial Relations)."

Said order and judgment of this court omits from the order of the Court of Industrial Relations of the state of Kansas, made on May 2, 1921, the following portions:

From the finding No. 3 thereof:

"Providing, however, That if the working hours of the week shall exceed forty-eight in number, all over forty-eight shall be paid for at the rate of time and one-half; furthermore, in case a day in excess of the eight-hour day shall be observed more than two days in one week, all over eight hours, except for said two days in said week, shall be paid for at the rate of time and one-half, even though the working hours of the week may be forty-eight hours or fewer."

And from the finding No. 14, thereof, the words "and overtime" and the words "under the terms of finding No. 3 hereof."

And from the finding No. 19 thereof, "in other departments, work performed on Sundays and legal holidays shall be paid for at the rate of time and one-half."

The portions of said findings Nos. 3, 14 and 19 of the Court of Industrial Relations of the state of Kansas, which have been omitted from the said judgment of this court, pertain to the subject of working and living conditions, hours of labor, rules and practices, and do not pertain to the subject of wages. This is made plain by the opinion of the supreme court of the United States in the case of Bunting v. Oregon, 243 U. S. 426; 37 Sup. Ct. 434, 437; 61 L. Ed. 830, 834, 835, 836. That decision upheld a statute of Oregon which provided in substance that no person should be employed in any mill, factory or manufacturing establishment in the state more than ten hours a day, with some exceptions, but provided that employees might work overtime not to exceed three hours in any one day, conditioned that payment be made for such overtime at the rate of time and one-half of the regular wage. The supreme court of the United States held that the statute was not a wage regulation, but was a regulation of hours, and that it was not in conflict with the pro- [fol. 4] visions of the fourteenth amendment to the United States constitution.

The supreme court of Oregon in that case, State of Oregon, Respondent, v. F. O. Bunting, Appellant, 71 Ore. 239; 139 Pac. 731; L. R. A. 1917C, 1162, 1168, said in discussing this point:

"It is contended by counsel for defendant that the provisions for employees to work overtime not to exceed three hours in any one day, conditioned that payment be made for said overtime at the rate of time and one-half the regular wage, renders the whole act void. It is clear that the intent of the law is to make ten hours a regular day's labor in the occupations to which reference is made. Apparently the provisions permitting labor for the overtime on express conditions were made in order to facilitate the enforcement of the law, and in the nature of a mild penalty for employing one not more

than three hours' overtime. It might be regarded as more difficult to detect violations of the law by an employment for a shorter time than for a longer time. This penalty also goes to the employee in case the employer avails himself of the overtime clause. Reasonable modes of enforcing a statute should be upheld. Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381; Com. v. Riley, supra, 210 Mass., at page 394, 97 N. E. 370, Ann. Cas. 1912D, 392, where Mr. Chief Justice Rugg says: 'When the constitutionality of the statute limiting the hours of labor of women is settled, the means by which the aim of the statute may be forwarded within reasonable bounds are matters for legislative determination.'

"Legislative provisions are frequently made that a portion of a fine for the infraction of a statute shall be paid to the informer. The aim of the statute is to fix the maximum hours of service in certain industries. The act makes no attempt to fix the standard of wages. No maximum or minimum wage is named. That is left wholly to the contracting parties."

L. R. A. 1917C, p. 1168.

The supreme court of the United States, discussing this point in the same case, said:

"'No person shall be employed in any mill, factory or (434) manufacturing establishment in this state more than ten hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger: Provided, however, Employees' may work overtime not to exceed three hours in any one day, conditioned that payment be made for such overtime at the rate of time and one-half of the regular wage.' (Laws 1913, chap. 102, p. 169.)"

* * * * * * *

"That the police power extends to health regulations is not denied, but it is denied that the law has such purpose or justification. It is [fol. 5] contended that it is a wage law, not a health regulation, and takes the property of plaintiff in (435) error without due process. The contention presents two questions: (1) Is the law a wage law, or an hours-of-service law? And (2) if the latter, has it equality of operation?"

* * * * * * *

"There is a certain verbal plausibility in the contention that it was intended to permit thirteen hours' work if there be fifteen and one-half hours' pay, but the plausibility disappears upon reflection. This provision for overtime is permissive, in the same sense that any penalty may be said to be permissive. Its purpose is to deter by its burden, and its adequacy for this was a matter of legislative judgment under the particular circumstances. It may not achieve its end, but its insufficiency cannot change its character (437) from

penalty to permission. Besides, it is to be borne in mind that the legislature was dealing with a matter in which many elements were to be considered. It might not have been possible, it might not have been wise, to make a rigid prohibition. We can easily realize that the legislature deemed it sufficient for its policy to give to the law an adaptation to occasions different from special cases of emergency for which it provided—occasions not of such imperative necessity, and yet which should have some accommodation; abuses prevented by the requirement of higher wages. Or even a broader contention might be made, that the legislature considered it a proper policy to meet the conditions long existent by a tentative restraint of conduct rather than by an absolute restraint, and achieve its purpose through the interest of those affected rather than by the positive fiat of the law.

"We cannot know all of the conditions that impelled the law or its particular form. The supreme court, nearer to them, describes the law as follows: 'It is clear that the intent of the law is to make ten hours a regular day's labor in the occupation to which reference is made. Apparently the provisions permitting labor for the overtime on express conditions were made in order to facilitate the enforcement of the law, and in the nature of a mild penalty for employing one not more than three hours' overtime. It might be regarded as more difficult to detect violations of the law by an employment for a shorter time than for a longer time. This penalty also goes to the employee in case the employer avails himself of the overtime clause.'"

* * * * * * *

"This case is submitted by plaintiff in error upon the contention that the law is a wage law, not an hours-of-service law, and he rests his case on that contention. To that contention we address our decision and do not discuss or consider the broader contentions of counsel for the state that would justify the law even as a regulation of wages.

[fol. 6] "There is a contention made that the law, even regarded as regulating hours of service, is not either necessary or useful 'for preservation of the health of employees in mills, factories and manufacturing establishments.' The record contains no facts to support the contention, and against it is the judgment of the legislature and the supreme court, which said: 'In view of the well-known fact that the custom in our industries does not sanction a longer service than ten hours per day, it cannot be held, as a matter of law, that the legislative requirement is unreasonable or arbitrary as to hours of labor.'"

In the above case the judgment of the supreme court of Oregon, sustaining the validity of the statute, was affirmed.

In the recent case of Adkins v. Children's Hospital of the District of Columbia, decided April 9, 1923, 43 S. Ct. 394, the supreme court of the United States again sustained the doctrine of the Bunting case in the following language:

"In Bunting v. Oregon, 243 U. S. 426, a state statute forbidding the employment of any person in any mill, factory or manufacturing establishment more than ten hours in any one day, and providing payment for overtime not exceeding three hours in any one day at the rate of time and a half of the regular wage, was sustained on the ground that, since the state legislature and state supreme court had found such a law necessary for the preservation of the health of employees in these industries, this court would accept their judgment, in the absence of facts to support the contrary conclusion. The law was attacked on the ground that is constituted an attempt to fix wages, but that contention was rejected and the law sustained as a reasonable regulation of hours of service."

The Oregon statute was thus again sustained as a reasonable regulation of hours of service, and distinguished in the Adkins case from a statute fixing wages. If the Oregon statute, including the provision for overtime, was valid, why is not that part of the order of the Court of Industrial Relations, including the penalty for overtime, valid as a regulation of hours of service? There is no distinction between the Oregon statute, sustained in the Bunting case, and the order of the Court of Industrial Relations in paragraphs 3, 14 and 19, including the penalties therein contained relating to overtime. We refer particularly to the statement by the supreme court of Oregon, above quoted.

The provisions in the orders of the Court of Industrial Relations in question, providing payment at the rate of time and one-half for overtime or Sundays and holidays, were with reference to the wages in effect for the regular time of the employees. The purpose was [fol. 7] not to fix wages for the overtime, but to prevent the employer requiring the employees to work overtime except when absolutely necessary. The imposition of the extra payment upon the employer would have the effect to keep down the overtime work to a minimum. This effect would be the same, whether the wages paid for the regular time were fixed by the employer or by the Court of Industrial Relations, so that the payment of the time and one-half was not dependent upon the wages for the regular time being fixed by the Court of Industrial Relations. If the wages for the regular time were fixed by the employer, there would be practically the same incentive, to wit, to keep down the amount of overtime, as if the wages were fixed by the Court of Industrial Relations. The time and a half provision was not for the purpose of fixing wages, but for the purpose of restricting overtime required to be worked, and was a reasonable and proper penalty for that purpose. It was a rule and practice laid down in order to enforce the provisions concerning the number of hours or days that the employees should be required to work. This is the view taken by the supreme court of Oregon and the supreme court of the United States, with reference to the Oregon statute referred to, and we submit it is the view that should be taken by this court with reference to the order of the Court of Industrial Relations. There is nothing in the opinion of the United States supreme court in this case on that point. Its ruling

in the Bunting case is still the law. The omitted portion of finding No. 19, providing for payment of time and a half for work performed on Sundays and legal holidays, is an apt illustration of the fact that such provision is a penalty for violation of limitation as to hours of labor and not an attempt to fix wages. It applies to whatever wages may be paid, regardless of the wage scale.

In Petit v. Minnesota, 177 U. S. 164, 20 S. Ct. 666, the supreme court of the United States recognized that periodical cessations from labor are necessary—"one day in seven is the rule, founded in experience, and sustained by science." To provide a penalty of time and a half for work performed on Sunday will tend to limit work on that day to such as is absolutely necessary.

That a basic eight-hour day is necessary in the industry in question is sustained by the finding made in the opinion of the Court of Industrial Relations, which this court no doubt adopted and approved in rendering its opinion originally herein, to wit:

"One of the principal contentions in the evidence is the question of the eight-hour basic day. Upon this point the evidence shows [fol. 8] that many workers, especially those engaged in what is called the killing, cutting and trimming departments, are in the very nature of the business compelled to work under conditions which are disagreeable and are not conducive to the health of the workers. Some of these workers are standing over scalding vats in rooms that are more or less filled with steam from the hot water; others are working under conditions which require them to wear rubber boots and rubber clothing to protect themselves from blood, water and steam; others are handling the entrails and the different parts of the carcasses of the slaughtered animals and using water in the cleansing process. While the evidence shows to the entire satisfaction of the court that the work in this plant is done under the best possible conditions of cleanliness, there is about the work that which not only requires strenuous physical exertion, but is also disagreeable and more or less unhealthful in other respects."

The Court of Industrial Relations also made the following finding (opinion):

"On the other hand, the respondent's evidence shows that it is unable to control the supply of live stock. Farmers and stock raisers will ship in the live stock when it is ready to ship; and so in spite of all the management can do to keep up a steady supply, there will be times when the yards fill up and it becomes necessary in order to avoid great loss to the company to run more than eight hours a day."

With this situation before it, should the prohibition as to working more than eight hours be absolute or adaptable? The Court of Industrial Relations adopted the policy of the legislature of Oregon, of which the supreme court of the United States said (Bunting v. Oregon, supra):

"It might not have been possible, it might not have been wise, to make a rigid prohibition. We can easily realize that the legislature deemed it sufficient for its policy to give to the law an adaptation to occasions different from special cases of emergency for which it provided—occasions not of such imperative necessity, and yet which should have some accommodation; abuses prevented by the requirement of higher wages."

The Court of Industrial Relations decided that it was a case of "abuses prevented by requirement of higher wages," and prescribed a penalty of time and one-half, as was done by the legislature of the state of Oregon. This requirement of time and one-half is a penalty for violation of limitation of hours of labor and not an attempt to fix wages.

The provisions for payment of wages at the rate of time and one-half for overtime and Sundays and legal holidays, in findings Nos. [fol. 9] 3, 14 and 19 of the Court of Industrial Relations, which were omitted in the judgment of this court upon the previous motions herein referred to, were not in conflict with either of the following provisions in section 1 of the fourteenth amendment to the United States constitution, which reads:

"No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The omission of the provisions referred to in findings Nos. 3, 14 and 19 of the Court of Industrial Relations in the judgment of this court was a violation of the rights of the plaintiff, the Court of Industrial Relations of the state of Kansas, under each and all of the foregoing quoted provisions in section 1 of the fourteenth amendment to the constitution of the United States.

It was not the intention of the judgment of the supreme court of the United States in the case at bar that the provisions referred to allowing time and a half for overtime should be treated as wage orders, but it was the intention that they should be treated as orders pertaining to hours of labor, and the prior judgment of this court enforcing those provisions should be and was by the supreme court of the United States affirmed. The supreme court of the United States, by its decision and judgment, intended to affirm as valid the prior judgment of this court, which sustained and ordered the enforcement of all of findings Nos. 3, 14 and 19 of the Court of Industrial Relations of the state of Kansas, which findings were made by it May 2, 1921.

The judgment of this court to which these motions are now addressed was erroneous in omitting the portions which it omitted, concerning the payment of time and one-half for overtime and for work performed on Sundays and legal holidays.

We therefore move the court to grant a rehearing of the motions upon which the last judgment of this court was entered, in order that its judgment may be corrected by reinstating the portions of findings Nos. 3, 14 and 19 of the Court of Industrial Relations which were omitted by this court in its last judgment, and that the last judgment of this court be modified by inserting in findings Nos. 3, 14 and 19 said omitted portions, so that said findings Nos. 3, 14 and 19, as finally enforced by this court, shall be in full the findings 3, 14 and 19 made by the Court of Industrial Relations of the state of [fols. 10 & 11] Kansas in its order of May 2, 1921, and that this court find specifically that such provisions pertain to hours of labor and working conditions and not to wages.

And we also move the court, in the alternative, in case it should not grant the relief above prayed for, but should take the view that said provisions pertain to hours of labor and working conditions and not to wages, and thinks the opinion and judgment of the supreme court of the United States require it to omit such provisions from said findings 3, 14 and 19, that this court should expressly so state in its opinion.

This case will again be taken by a writ of error to the supreme court of the United States, and it is important for the settlement of the questions presented, if this court should be of the opinion last referred to, that it should explicitly and fully state its position on both points, as prayed for in the last paragraph. In that contingency one of the questions to be presented to the supreme court of the United States will appear upon the record in a clear and definite form, but otherwise it would not so appear.

Charles G. Griffith, Attorney-general; John G. Egan, Asst. Attorney-general; Randal C. Harvey, Attorney for the Court of Industrial Relations, Attorneys for Plaintiff. Chester I. Long, of Wichita; Austin M. Cowan, of Wichita, of Counsel.

[fols. 12 & 13] IN SUPREME COURT OF KANSAS

[Title omitted]

ORDER ALLOWING MOTION FOR A MODIFICATION OF JUDGMENT AND ORDER FOR A PEREMPTORY WRIT OF MANDAMUS

Now comes on for decision of motion of the plaintiff to modify the judgment of this court spreading the mandate of the Supreme Court of the United States on the records of this court; and thereupon after due consideration by the court it is ordered that said motion be allowed. It is further ordered that the Clerk of this Court issue a peremptory writ of mandamus to the defendant herein commanding the defendant to put into effect the following portions of the order of the court of industrial relations:

"3. A basis working day of eight hours shall be observed in this industry; but a nine-hour day may be observed not to exceed two days in any one week without penalty: Provided, however, That if the working hours of the week shall exceed forty-eight in number, all over forty-eight shall be paid for at the rate of time and one-half; furthermore, in case a day in excess of the eight hour day shall be observed more than two days in any one week, all over eight hours, except for said two days in said week, shall be paid for at the rate of time and one-half, even though the working hours of the week may be forty-eight hours or fewer."

"14. Workers paid for by the week or day, if employed within the plant and not within the office or sales department, shall be subject to hours of work and overtime as other employees under the terms of finding No. 3 hereof."

"19. In departments operating twenty-four hours a day and seven days a week, each employee therein shall be entitled to one day off each week. In other departments work performed on Sunday and legal holidays shall be paid for at the rate of time and one-half.

"This order shall continue in force until changed by the Court (The Court of Industrial Relations) or changed by agreement of the parties with the approval of the court (the Court of Industrial Relations)."

[fol. 14] IN SUPREME COURT OF KANSAS

[Title omitted]

OPINION

Syllabus by the Court

1. This court has jurisdiction under its rules to hear a motion for rehearing or modification of judgment, if filed within proper time, notwithstanding a writ of error to the supreme court of the United States has been allowed and citation served.
2. The Supreme court of this state is controlled by the decision of the supreme court of the United States declaring invalid all that part of chapter 29 of the Laws of 1920 which confers on the court of industrial relations the power to fix wages, but the order of that court fixing wages for overtime at time and one-half concerns working conditions and is legal.
3. Such an order of the court of industrial relations does not violate section 6 of article 6 of the constitution of this state.

Opinion on motion for rehearing and modification of judgment. Opinion filed November 10, 1923. Motion for modification of judgment allowed.

Charles B. Griffith, attorney-general, John G. Egan, assistant attorney-general, and Randal C. Harvey, all of Topeka, attorneys for plaintiff; Chester I. Long, and Austin M. Cowan, both of Wichita, of counsel.

[fol. 15] D. R. Hite, John S. Dean, and Harry W. Colmery, all of Topeka, attorneys for defendant.

Johnston, C. J., Mason, J., Marshall, J., Dawson, J., and Hopkins, J., concurring.

Burch, J., adheres to the views formerly expressed by him in Court of Industrial Relations v. Packing Co., 111 Kan. 501, 519, 207 Pac. 606.

Harvey, J., dissenting in part.

A true copy. Attest: —— ——, Clerk Supreme Court.

[fol. 16] The opinion of the court was delivered by MARSHALL, J.:

The plaintiff moves "for a rehearing and for a modification of the judgment entered upon the motion of the plaintiff to spread the mandate from the supreme court of the United States and to modify judgment, and on the motion of the defendant to spread the mandate of the supreme court of the United States upon the record and to enter judgment pursuant thereto."

We quote from the motion as follows:

"This court, in its judgment upon said motions, ordered that a peremptory writ of mandamus issue, commanding the defendant to put into effect the following parts of the order of the court of industrial relations of the state of Kansas, to-wit:

" '3. A basis working day of eight hours shall be observed in this industry; but a nine hour day may be observed not to exceed two days in any one week without penalty.

" '14. Workers paid by the week or day, if employed within the plant and not within the office or sales department, shall be subject to hours of work * * * as others employed.

" '19. In departments operating twenty-four hours a day and seven days a week, each employee therein shall be entitled to one day off each week.

" 'This order shall * * * continue in force until changed by the court (the court of industrial relations) or changed by agreement of the parties with the approval of the court (the court of industrial relations).'

"Said order and judgment of this Court omits from the order of the court of industrial relations of the State of Kansas, made on May 2, 1921, the following portions:

"From the finding No. 3 thereof: 'Providing, however, that if the working hours of the week shall exceed forty-eight in number, all over forty-eight shall be paid for at the rate of time and one-half;

furthermore, in case a day in excess of the eight hour day shall be observed more than two days in one week, all over eight hours, [fol. 17] except for said two days in said week, shall be paid for at the rate of time and one half, even though the working hours of the week may be forty-eight hours or fewer.'

"And from the finding No. 14 thereof, the words, 'and overtime', and the words, 'under the terms of finding No. Three hereof'.

"And from the finding No. 19 thereof, 'in other departments, work performed on Sundays and legal holidays shall be paid for at the rate of time and one-half.' "

1. The defendant objects to the jurisdiction of this court to hear the motion and bases its objection on the following facts: On October 11, 1923, a writ of error to the supreme court of the United States was allowed by the chief justice of this court, and on October 12, 1923, citation signed by the chief justice was served on counsel of record for the plaintiff. The defendant contends that by virtue of these proceedings, this cause was removed from thist court and since October 12, 1923, has been pending in the United States supreme court. The opinion and order of this court directing the mandate of the supreme court of the United States to be spread of record and entering judgment in obedience to that mandate was filed on October 6, 1923; the motion of the plaintiff for rehearing and modification of the judgment was filed October 22, 1923. Under the rules of this court, motions for rehearing or for modification of judgment may be filed within twenty days after the decision. The motion of the plaintiff was filed within that time. Such a motion challenges the attention of the court to any mistakes that may have been made by the court, and gives an opportunity to correct those mistakes. Jurisdiction to correct mistakes is not lost by a writ of error to the supreme court of the United States taken before the motion for rehearing or modification has been filed.

2. On receiving the mandate of the supreme court of the United States, this court construed the opinion of that court as declaring invalid all that part of chapter 29 of the Laws of 1920 which attempts to give the court of industrial relations power to fix wages. The industrial court law gives to the court of industrial relations power to prescribe working conditions and hours of labor and authorizes the [fol. 18] court to compel compliance with the order by increasing the compensation to be paid workmen who must work under conditions more unfavorable or work longer hours than those prescribed.

Section 8 of Chapter 29 of the Laws of 1920, in part reads:

"The court of industrial relations shall order such changes, if any, as are necessary to be made in and about the conduct of said industry, employment, utility or common carrier, in the matters of working and living conditions, hours of labor, rules and practices and a reasonable minimum wage, or standard of wages, to conform to the findings of the court in such matters, as provided in this act, and such orders shall be served at the same time and in the same manner as provided for the service of the court's findings in this act. * * *"

We quote from Bunting v. Oregon, 243 U. S. 426, 436, as follows:

"There is a certain verbal plausibility in the contention that it was intended to permit 13 hours' work if there be 15½ hours' pay, but the plausibility disappears upon reflection. The provision for overtime is permissive, in the same sense that any penalty may be said to be permissive. Its purpose is to deter by its burden and its adequacy for this was a matter of legislative judgment under the particular circumstances. It may not achieve its end, but its insufficiency cannot change its character from penalty to permission. Besides, it is to be borne in mind that the legislature was dealing with a matter in which many elements were to be considered. It might not have been possible, it might not have been wise, to make a rigid prohibition. We can easily realize that the legislature deemed it sufficient for its policy to give to the law an adaptation to occasions different from special cases of emergency for which it provided, occasions not of such imperative necessity, and yet which should have some accommodations—abuses prevented by the requirement of higher wages. Or even a broader contention might be made that the legislature considered it a proper policy to meet the conditions long existent by a tentative restraint of conduct rather than by an absolute restraint, and achieve its purpose through the interest of those affected rather than by the positive fiat of the law.

[fol. 19] "We cannot know all of the conditions that impelled the law or its particular form. The Supreme Court, nearer to them, describes the law as follows: 'It is clear that the intent of the law is to make 10 hours a regular day's labor in the occupation to which reference is made. Apparently the provisions for permitting labor for the overtime on express conditions were made in order to facilitate the enforcement of the law, and in the nature of a mild penalty for employing one not more than three hours overtime. It might be regarded as more difficult to detect violations of the law by an employment for a shorter time than for a longer time. This penalty also goes to the employee in case the employer avails himself of the overtime clause.' "

The order for time and a half pay for overtime work is not an order fixing wages. The order of the court of industrial relations fixes eight hours for a day's work, but recognizes that at the same time it may become necessary to work more than eight hours in any one day, and, to discourage such practice and to enforce the order for eight hours, imposes a penalty to be paid to the workmen for the overtime work.

3. The defendant urges that if time and one-half pay for overtime work is a penalty, it violates section 6 of article 6 of the constitution of this state, which in part reads:

"* * * The proceeds of fines for any breach of the penal laws, shall be exclusively applied in the several counties in which the money is paid or fines collected, to the support of common schools."

Section 8618 of the General Statutes of 1915 prescribes the rates that shall be charged by railroads for carrying certain articles. Section 8619 provides that any common carrier that shall demand, exact or receive, for carrying any of the articles named, a sum in excess of that named in the statute shall be liable to any person injured in the sum of $500 as liquidated damages. That was held not to be a penalty within the meaning of the constitution. (Tucker v. Railway Co., 82 Kan. 222, 224, 108 Pac. 89.)

[fol. 20] Section 3410 of the General Statutes of 1915 makes it a felony for a man to desert, neglect or refuse to provide for the support of his wife in destitute or necessitous circumstances. Section 3412 of the General Statutes of 1915 reads:

"At any time before the trial, upon petition of the complainant and upon notice to the defendant, the court, or a judge thereof in vacation, may enter such temporary order as may seem just, providing for support of the deserted wife or children, or both, pendente lite, and may punish for violation of such order as for contempt."

In The State v. Gillmore, 88 Kan. 835, 839, 129 Pac. 1123, this court said:

"The fact that the court is authorized instead of putting the sentence into execution at once to parole and recognize the defendant on condition that he provide periodical support for his wife does not render the act void for diversion of a fine from the direction required by section 6 of article 6 of the constitution, which requires the proceeds of fines for the breach of any penal laws to be applied exclusively to the support of common schools. The payment required under this sort of order is the payment of a sum found by the court to be reasonable for the support of a wife by virtue of which payment the defendant escapes the penalty of the law, and it can by no process of reasoning be rightfully considered a fine."

It has been held that the penalty imposed for violating an injunction prohibiting one from allowing water to overflow from his premises to that of another is not a penalty under the constitutional provision. (Holloway v. Water Co., 100 Kan. 414, 167 Pac. 265.)

Section 3856 of the General Statutes of 1915 reads:

"Any person who shall hereafter be convicted of killing or of conspiring with another to kill, or of procuring to be killed, any other person from whom such person so killing or conspiring to kill or procuring said killing would inherit the property, real, personal, or mixed, or any part thereof, belonging to such deceased person at the time of death, or who would take said property by deed, will or otherwise, at the death of the deceased, shall be denied all right, interest [fol. 21] and estate in or to said property or any part thereof, and the same shall descend and be distributed to such other person or persons as may be entitled thereto by the laws of descent and distribution, as if the person so convicted were dead."

It has been held that this statute is not penal and that it does not work a forfeiture. (Hamblin v. Marchant, 103 Kan. 508, 175 Pac. 678; Hamblin v. Marchant, 104 Kan. 689, 692, 180 Pac. 811.)

The motion of the plaintiff to modify the judgment of this court rendered when the mandate of the supreme court of the United States was ordered recorded is allowed.

It is by the court ordered that a peremptory writ of mandamus do issue commanding the defendant to put into effect the following parts of the order of the court of industrial relations:

"3. A basic working day of eight hours shall be observed in this industry; but a nine-hour day may be observed not to exceed two days in any one week without penalty: Provided, however, That if the working hours of the week shall exceed forty-eight in number, all over forty-eight shall be paid for at the rate of time and one-half; furthermore, in case a day in excess of the eight-hour day shall be observed more than two days in any one week, all over eight hours, except for said two days in said week, shall be paid for at the rate of time and one-half, even though the working hours of the week may be forty-eight hours or fewer."

"14. Workers paid by the week or day, if employed within the plant and not within the office or sales department, shall be subject to hours of work and overtime as other employees under the terms of finding No. 3, hereof."

"19. In departments operating twenty-four hours a day and seven days a week, each employee therein shall be entitled to one day off each week. In other departments work performed on Sunday and legal holidays shall be paid for at the rate of time and one-half.

[fol. 22] "This order shall * * * continue in force until changed by the Court (the court of industrial relations) or changed by agreement of the parties with the approval of the court (the court of industrial relations)."

Johnston, C. J., Mason, J., Dawson, J., and Hopkins, J., concurring.

Burch, J., adheres to the views formerly expressed by him in Court of Industrial Relations v. Packing Co., 111 Kan. 501, 519, 207 Pac. 606.

Harvey, J. (dissenting in part): A proper interpretation of the decision of the supreme court in this case requires that the former judgment of this court be reversed in its entirety. In any event, the order that payment of wages shall be made at the rate of time and a half for overtime is one respecting wages, and cannot be made in conformity with the opinion of the supreme court.

A true copy. Attest: —— ——, Clerk Supreme Court.

[fol. 23] [File endorsement omitted]

[fol. 24] IN THE SUPREME COURT OF KANSAS

[Title omitted]

MOTION FOR A REHEARING AND ORDER OVERRULING SAME—Filed Nov. 28, 1923

And now comes the Chas. Wolff Packing Company, the above named defendant, and respectfully shows to the court that on Saturday, November 10, 1923, this court entertained the application of the plaintiff for a modification of the judgment and order made in this court and cause on October 6, 1923, and added to the requirements to be performed by the defendant by directing that a peremptory writ of mandamus issue requiring the defendant to put into effect a basic day of eight hours at its plant in Topeka, Kansas, and that in the event certain of its employes were required by the defendant to work longer than eight hours a day for forty-eight hours a week the respondent should pay to such employes time and one-half for such overtime.

The above named defendant respectfully shows to the court that this modification of the original judgment was made subsequent to the time when this respondent had procured the allowance and issue of a writ of error to the Supreme Court of the United States and that on November 10, 1923, when said judgment was modified, there was pending in the Supreme Court of the United States proceedings in error brought by this defendant to reverse the judgment of this court entered October 6, 1923.

Said defendant further shows to the court that in its last decision modifying the judgment heretofore made herein, this court erroneously failed to give proper force and effect to the decision and judgment of the Supreme Court of the United States in the controlling case of Lochner vs. New York, 198 U. S. 45, although that decision and judgment was directly called to the attention of the court in the brief and argument made by this defendant in resistance of the application made by the plaintiff herein for such modification.

The defendant further shows to the court that it is greatly embarrassed by the present condition of the record herein, for that transcript of the proceedings and judgment of this court have been by its Clerk duly forwarded to the Supreme Court of the United States and there docketed; that such transcript does not show the modification made by this court in its opinion and decision entered herein on November 10, 1923; that this defendant, pursuant to the order of this court granting its petition for a writ of error, has duly filed in this [fol. 25] court its bond in the sum of Twenty Thousand ($20,000.-00) Dollars to act as a supersedeas in respect of the judgment entered by this court as of October 6, 1923; that the modification of such judgment, pursuant to the order and decision of this court on November 10, 1923, leaves this defendant in doubt as to its present situation

in respect of the peremptory writ of mandamus provided to be issued according to the decision of this court last rendered herein; that it is in the interest of justice and propriety that at all events this court should stay the execution of said last judgment until this defendant shall have an opportunity of taking the opinion of the Supreme Court of the United States as to the condition of the record; that proper respect for that court indicates to this defendant the propriety of making application, either for an additional writ of error, or for a writ of certiorari, to bring to that court such remaining portions of the record as may be essential to the final decision of this cause;

The premises considered, this defendant respectfully prays that this court grant a rehearing in the above entitled cause and that at all events it grant a stay in respect of said last mentioned writ of mandamus for a period of twenty days from December 1, 1923, so as to enable this defendant to make such application to the Supreme Court of the United States as may be deemed necessary to secure the judgment of that court as to proper practice and procedure to have the record of this court before it.

D. R. Hite, Attorney for the Chas. Wolff Packing Company.

[fols. 26 & 27] [File endorsement omitted]

[fol. 28] [Title omitted]

Now comes on for decision the petition for a rehearing of this cause; and thereupon it is ordered that said petition for a rehearing be denied.

[fols. 29 & 30] In Supreme Court of Kansas

[Title omitted]

Clerk's Certificate

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings had in the above entitled case, and also of the opinion of the court rendered thereon as the same appear on file and remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at my office in the city of Topeka, this 13th day of February, 1924.

D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. (Seal Supreme Court, State of Kansas.)

[fol. 31] [File endorsement omitted]

IN SUPREME COURT OF KANSAS

[Title omitted]

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed Feb. 7, 1924

Considering itself aggrieved by the final decision of the Supreme Court of the State of Kansas in its certain order and judgment entered in the above entitled cause in said court on November 10, 1923, the Chas. Wolff Packing Company, the above named defendant, hereby prays a writ of error from said decision and judgment to the Supreme Court of the United States. The said defendant, The Chas. Wolff Packing Company, herewith presents its assignments of error upon which it will rely for a reversal of said decision, order and judgment.

D. R. Hite, Attorney for the Chas. Wolff Packing Co.

STATE OF KANSAS,
Shawnee County, ss:

Let a writ of error issue upon the execution by the defendant, The Chas. Wolff Packing Company, of a bond in the sum of One Thousand ($1,000.00) Dollars, the said bond when approved, to act as a supersedeas.

W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas.

[fol. 31½] [File endorsement omitted]

[fol. 32] IN SUPREME COURT OF KANSAS

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Feb. 7, 1924

The said The Chas. Wolff Packing Company, with its petition for a writ of error from a certain order and judgment entered by this court in the above entitled cause on November 10, 1923, presents the following assignments of error in said ruling, judgment and decision heretofore made and entered in this cause by this court on November 10, 1923.

(1) Said court erred in failing and refusing to reverse, vacate and set aside its judgment made and entered in this cause on June 10, 1922, as directed by the mandate and judgment of the United States Supreme Court dated June 11, 1923.

(2) That said Kansas Supreme Court erred in holding and deciding that it had jurisdiction to modify its said judgment of June 10, 1922; whereas, it should have held and determined that, upon the reversal of said judgment by the United States Supreme Court, said Kansas Supreme Court had jurisdiction only to carry the mandate of the United States Supreme Court into effect by vacating, setting aside and annulling its said judgment of June 10, 1922.

[fol. 33] (3) Said Kansas Supreme Court erred in failing to give full force and effect to the said judgment and mandate of the Supreme Court of the United States; and that the said judgment of said Kansas Supreme Court, so entered on November 10, 1923, is not consistent with, but is opposed to, the opinion and decision of the Supreme Court of the United States made and entered in this cause.

(4) Said Kansas Supreme Court erred in sustaining the motion of the plaintiff, the Court of Industrial Relations of the State of Kansas, to modify said judgment of June 10, 1922, instead of reversing, vacating and annulling such judgment.

(5) Said Kansas Supreme Court erred in holding and deciding that the parts of the order of the court of industrial relations made on May 2, 1921 and upheld in the decision of said Kansas Supreme Court of November 10, 1923, were valid as against the said packing company; and in holding and deciding that the said parts of said order so held valid did not deprive the Chas. Wolff Packing Company and its employes of their liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(6) That said Kansas Supreme Court erred in holding and deciding that the act creating the court of industrial relations, as applied to the said packing company in said order of said court of industrial relations, so upheld by said Kansas Supreme Court, was valid and was not opposed to and violative of said Fourteenth Amendment.

(7) Said Kansas Supreme Court erred in refusing and denying the motion of the said packing company to enter an order and judgment in this cause consistent with the decision, opinion, judgment and mandate of the Supreme Court of the United States.

8. Said Kansas Supreme Court erred in holding valid any part of the order of the court of industrial relations dated May 2, 1921.

[fol. 34] 9. Said Kansas Supreme Court erred in holding and deciding that its said judgment of November 10, 1923 did not deprive said packing company of its liberty and property in violation of the Fourteenth Amendment to the Constitution of the United States, and in holding and deciding that said court of industrial relations had jurisdiction, power and authority to regulate the terms of employment of employees of said packing company, notwithstanding the claim of said packing company that such ruling and decision deprives it of its liberty and property without due process

of law and denies to it the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

The said Chas. Wolff Packing Company presents the foregoing assignments of error in the ruling and decision of the Supreme Court of the State of Kansas dated November 10, 1923, and prays that such disposition be made thereof as may be in accordance with the laws of the United States in such cases made and provided The said Chas. Wolff Packing Company further respectfully prays that for the errors herein assigned the said ruling and decision be reversed and that a judgment be entered by the Supreme Court of the United States that the statute creating the court of industrial relations, as applied to the said packing company in said ruling, judgment and decision, deprives it of its liberty and property without due process of law and denies to it the equal protection of the law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States; and that said judgment and decision be reversed, vacated and annulled and said packing company restored in all things to its rights so secured to it by said amendment.

D. R. Hite, Attorney for the Chas. Wolff Packing Company.

[fol. 34½] [File endorsement omitted]

[fol. 35] Bond on Writ of Error for $1,000—Approved and and filed Feb. 8, 1924; omitted in printing

[File endorsement omitted.]

[fol. 36] [File endorsement omitted.]

In Supreme Court of Kansas

Writ of Error—Filed Feb. 8, 1924

United States of America:

The President of the United States to the Supreme Court of the State of Kansas:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in said Supreme Court of Kansas before you, at the November 1923 sitting of the July 1923 Term thereof, between the Court of Industrial Relations, plaintiff, vs. The Chas. Wolff Packing Company, defendant, a manifest error hath happened to the great damage of said defendant, the Chas. Wolff Packing Company, as by its complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said records and proceedings aforesaid in the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court, on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this February 8th, 1924.

Done in the City of Topeka, with the seal of the District Court of the United States for the District of Kansas attached.

F. H. Campbell, Clerk of the United States District Court for for the District of Kansas. (Seal of District Court of U. S. Dist. of Kansas.)

Allowed: W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas.

[fol. 36½] [File endorsement omitted.]

[fol. 37] CITATION—In usual form, showing service on Randall C. Harvey; omitted in printing

[fol. 37½] [File endorsement omitted.]

[fol. 38] IN SUPREME COURT OF KANSAS

CERTIFICATE OF LODGMENT

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that there was lodged with me as such clerk of February 9th, 1924 in the above entitled case

1. The Original Bond for appeal of which a copy is herein set forth,
and
2. Two copies of the Writ of error as herein set forth, one for the plaintiff and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court of the State of Kansas, in the city of Topeka, this 13th day of February, 1924.

D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. (Seal of Supreme Court, State of Kansas.)

[fol. 39] IN SUPREME COURT OF KANSAS

RETURN TO WRIT OF ERROR

In obedience to the commands of this writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Kansas in the city of Topeka, this 13th day of February, A. D. 1924.

D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. (Seal of Supreme Court, State of Kansas.)

Endorsed on cover: File No. 30149. Kansas Supreme Court. Term No. 299. The Chas. Wolff Packing Company, plaintiff in error, vs. The Court of Industrial Relations of the State of Kansas. Filed February 26th, 1924. File No. 30149.

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IN THE

Supreme Court of the United States

October Term, 1924.

No. 207

CHAS. WOLFF PACKING COMPANY,
Plaintiff-in-Error,

vs.

COURT OF INDUSTRIAL RELATIONS OF THE STATE OF KANSAS, Defendant-in-Error.

No. 299

CHAS. WOLFF PACKING COMPANY,
Plaintiff-in-Error,

vs.

COURT OF INDUSTRIAL RELATIONS OF THE STATE OF KANSAS, Defendant-in-Error.

Statement, Brief and Argument of The Plaintiff-in-Error.

These two cases again bring before this court the constitutionality of the Kansas statute creating the court of industrial relations. (Ch. 29, Special Session Laws of 1920.) In Case No. 739, October Term, 1922, decided June 11, 1923, (262 U. S. 522) this court reversed a judgment of the Supreme Court of Kansas rendered on June 10, 1922, directing the Chas. Wolff Packing Company, Plaintiff-in-Error (hereafter called the packing company), to observe a certain order made by the Court of Industrial Relations of the State of Kansas, Defendant-in-Error in

each of the above cases, (hereafter called the industrial court). Upon filing the mandate in the Supreme Court of Kansas, a controversy arose involving its interpretation in the light of the opinion of this court to which it referred. These two writs of error bring up for review this controversy and the proceedings in the Kansas Supreme Court subsequent to the filing of the mandate. The cases turn upon the correctness of the lower court's re-interpretation of the Act creating the industrial court in the light of this court's opinion and judgment in the original case.

Case No. 207.

This writ of error brings up a judgment of the Kansas Supreme Court of October 6, 1923, upon the application of the industrial court for a modification of the original judgment of that court, claiming that notwithstanding the reversal of the original judgment, the Kansas Supreme Court was authorized by the language of this court's opinion to modify its judgment instead of vacating it as a whole. This application set out that certain paragraphs of the industrial court's order, prescribing wages to be paid by the packing company to its employes, were declared invalid by the judgment of this court, but that certain other portions of that order, prescribing hours of labor, were not invalidated by that judgment; and, therefore, the original judgment should be modified by striking out only such portions as expressly prescribed the wages to be paid by the packing company to its employes, leaving in full force and effect all other provisions. (Transcript Case No. 207, pages 3-4.)

The packing company objected to this application on the ground that the judgment of this court reversed the

judgment of the Kansas court as a whole, and deprived the Kansas court of any authority to modify it. (Transcript Case No. 207, pages 5-6-7.)

Upon hearing the Kansas Supreme Court sustained the industrial court's application in part and entered a judgment requiring the packing company to observe the following parts of the original order of the industrial court:

> "(3) A basic working day of eight hours shall be observed in this industry; but a nine hour day may be observed not to exceed two days in any one week without penalty.
>
> "(14) Workers paid by the week or day, if employed within the plant and not within the office or sales department, shall be subject to hours of work . . . as other employed.
>
> "(19) In departments operating twenty-four hours a day and seven days a week, each employee therein shall be entitled to one day off each week.
>
> "This order shall . . . continue in force until changed by the Court (the court of industrial relations) or changed by agreement of the parties with the approval of the court (the court of industrial relations.)" (Transcript Case No. 207, page 7.)

The opinion of the lower court will be found on pages 8-9-10-11-12, Transcript Case No. 207.

On October 11, 1923, the Chief Justice of the Kansas court granted the packing company's petition for a writ of error and approved its bond to act as a supersedeas, and thereafter a transcript of the record, including the above judgment, was duly lodged in this court. (Transcript Case No. 207, pages 15-16-17.)

Case No. 299.

Subsequent to the allowance of the writ of error in Case No. 207, but within the time fixed by the rules of the Kansas court for filing petitions for rehearing, the industrial court renewed its application for a modification of the original judgment, insisting that in its judgment of October 6, 1923, the Kansas court erred in not prescribing that employes who worked longer than the number of hours fixed by the judgment, should receive wages on a basis of time and one-half for overtime. (Transcript Case No. 299, pages 1 to 8.)

The packing company appeared specially to this application setting out the pendency in this court of the writ of error in case No. 207 and contending that the granting of such writ of error, giving of bond, etc., deprived the Kansas court of jurisdiction further to proceed; and, again contended that the judgment of this court reviewing the original judgment of the Kansas court did not authorize the proposed modification. The packing company also objected to further consideration of either of the applications on the ground that the judgment as modified, and as proposed to be modified, sustained compulsory arbitration by the industrial court of a dispute with its employes, when, under the decision of this court, the Industrial Court Act was unconstitutional as applied to such disputes because it invaded the rights secured to the packing company and its employes by the Fourteenth Amendment to the Constitution of the United States. A copy of this is printed as an appendix to this brief. After a hearing upon this second application, in the nature of a petition for rehearing, and the objections of the packing company, the Kansas court on November 10, 1923, delivered its opinion and

judgment directing the packing company to observe the following parts of the original order made by the industrial court:

> "(3) A basic working day of eight hours shall be observed in this industry; but a nine-hour day may be observed not to exceed two days in any one week without penalty: *Provided, however,* That if the working hours of the week shall exceed forty-eight in number, all over forty-eight shall be paid for at the rate of time and one-half; furthermore, in case a day in excess of the eight-hour day shall be observed more than two days in any one week, all over eight hours, except for said two days in said week, shall be paid for at the rate of time and one-half, even though the working hours of the week may be forty-eight hours or fewer.
>
> "(14) Workers paid by the week or day, if employed within the plant and not within the office or sales department, shall be subject to hours of work and overtime as other employes under the terms of finding No. 3 hereof.
>
> "(19) In departments operating twenty-four hours a day and seven days a week, each employe therein shall be entitled to one day off each week. In other departments work performed on Sunday or legal holidays shall be paid for at the rate of time and one-half.
>
> "This order shall . . . continue in force until changed by the court (the court of industrial relations) or changed by agreement of the parties with the approval of the court (the court of industrial relations)." (Transcript Case No. 299, pages 8-9.)

The opinion will be found on pages 9 to 14 of Transcript Case No. 299.

Thereafter, and within due time, the Chief Justice of the Kansas Supreme Court allowed this second writ of error and approved a bond to act as a supersedeas, and

a transcript of the record of the proceedings in the Kansas court subsequent to the allowance of the writ of error in case No. 207 was duly lodged in this court. (Transcript Case No. 299, pages 17-18-19-20.)

Cases Heard Together.

These two cases should be considered together. The plaintiff in error does not desire, because of any technical irregularity in the proceedings of the Kansas court, if there was any such irregularity, to embarass a decision by this Court of the questions presented by these records.

History of Controversy.

It is deemed necessary briefly to refer to the original proceedings in this court resulting in the decision and judgment of June 11, 1923 (262 U. S. 522). That case was a writ of error bringing up a judgment in the nature of a writ of mandamus entered by the Kansas Supreme Court on June 10, 1922, directing the packing company, "to put into effect those parts of the order of the Court of Industrial Relations numbered 2, 3, 4, 9, 11, 14, 15, 17, 18 and 19." (Transcript Case No. 739, October Term, 1922.)

For convenience these parts are here copied:

> "(2) Employes, whether organized or unorganized, shall receive wages as shown in schedules hereinafter set out.
>
> "(3) A basic working day of eight hours shall be observed in this industry; but a nine-hour day may be observed not to exceed two days in any one week without penalty: Provided, however, That if the working hours of the week shall exceed forty-eight in number, all over forty-eight shall be paid for at the rate

of time and one-half; furthermore, in case a day in excess of the eight-hour day shall be observed more than two days in any one week, all over eight hours, except for said two days in said week, shall be paid for at the rate of time and one-half, even though the working hours of the week may be forty-eight hours or fewer.

"(4) No guarantee of time per week is specifically found at this time, but sufficient work should be offered to the regular employes in each and every month so that the monthly earnings of regular workers will be sufficient to constitute a fair wage under the Kansas industrial law, as heretofore defined by this court.

"(9) Women workers shall receive the same wages as men engaged in the same class and kind of work.

"(11) Piece-work rates shall be paid in accordance with piece-work schedule herein set out.

"(14) Workers paid by the week or day, if employed within the plant and not within the office or sales department, shall be subject to hours of work and overtime as other employes under the terms of finding No. 3 hereof.

"(15) The temporary order heretofore made in this case shall stand and be complied with by the respondent company, beginning on the date of said temporary order and continuing until May 1st, 1921, the date of this order.

"(17) The following schedule of minimum wages shall be paid by the respondent company to its respective employes, to-wit: (This paragraph contained a schedule of minimum wages to be paid by the packing company to employes engaged in the occupations specified in the schedule, which listed each station, employment or job, with the hourly wage scale to be paid therefor, separating and classifying the stations, employments or jobs by departments, of which there were twenty-four.)

"(18) The establishing of the above minimum wage schedule shall not in any way be construed as restricting or preventing the respondent from paying a higher wage when the same is deemed advisable.

> "(19) In departments operating twenty-four hours a day and seven days a week, each employe therein shall be entitled to one day off each week. In other departments, work performed on Sundays and legal holidays shall be paid for at the rate of time and one-half."

Shortly stated, all of the original order made by the industrial court and sustained by the Kansas court, was declared invalid except three paragraphs numbered 3, 14 and 19, and the concluding sentence: "This order shall continue in force until changed by the court or changed by agreement of the parties with the approval of the court." The validity of these paragraphs is to be determined in these cases.

Specifications of Error.

(1) The Kansas Supreme Court erroneously decided that it was authorized by the opinion and judgment of this court in case No. 739 to hold valid parts of its judgment reversed by this court.

(2) The Kansas Supreme Court erred in holding that paragraphs 3, 14 and 19, together with the concluding command of the industrial court's order did not deprive the packing company and its employes of their liberty and property without due process of law, and did not deny to the packing company and its employes the equal protection of the laws secured to them by the Fourteenth Amendment to the Constitution of the United States.

(3) The Kansas Supreme Court erred in holding that under the opinion and judgment of this court the industrial court was authorized to enforce its arbitration of a dispute between the packing company and its employes, and to fix hours of labor and prescribe wages to be paid

for overtime in the conduct by the packing company of its packing plant and in dealing with its employes.

Points and Authorities.

The mandate and judgment of this court required the vacation of the judgment of the Kansas Supreme Court as a whole and did not authorize its modification upon the original record.

Sec. 709 U. S. Rev. Stat.
Cowdrey vs. Bank, 139 Cal. 293; 73 Pac. 196.
Davis vs. Healey, 22 N. J. 115.
Effinger vs. Kimmey, 92 U. S. 245.

The purpose and object of the Industrial Court Act (Ch. 29, Special Session Laws 1920) is the compulsory arbitration of disputes between employers and employes in designated industries, endangering continuity of operation of such industries. The act was not concerned with the health of employes engaged in operating such industries.

Howat's case, 109 Kan. 376, 414, 415.
Industrial Court vs. Packing Company, 109 Kan. 645, 646.
Industrial Court vs. Packing Company, 111 Kan. 501, 502.
Dorchy vs. Kansas, 264 U. S. 286.
Packing Company vs. Industrial Court, 262 U. S. 522.

Bunting vs. Oregon, 243 U. S. 426, is not authority for upholding the order of the industrial court fixing hours and conditions of labor.

Packing Company vs. Industrial Court, 262 U. S. 522.
Lochner vs. New York, 198 U. S. 45.
Dorchy vs. Kansas, 264 U. S. 286.

Bunting vs. Oregon, 243 U. S. 426.
Adkins vs. Children's Hospital, 261 U. S. 525.

Considered as a statute authorizing an order fixing hours and conditions of labor for packing house employes, the Act creating the Court of Industrial Relations encounters the Fourteenth Amendment.

Packing Company vs. Industrial Court, 262 U. S. 522.
Lochner vs. N. Y., 198 U. S. 45.
Dorchy vs. Kansas, 264 U. S. 286.
Allgeyer vs. Louisiana, 165 U. S. 578.
Adair vs. U. S., 208 U. S. 161.
Coppage vs. Kansas, 236 U. S. 1.
Truax vs. Raich, 239 U. S. 33.
Prudential Insurance Company vs. Cheek, 259 U. S. 530.
Smyth vs. Ames, 169 U. S. 527, 528.
Hairston vs. Danville & Western Ry. Co., 208 U. S. 606.
Mugler vs. Kansas, 123 U. S. 661.
St. Louis Ry. Co. vs. Arkansas, 235 U. S. 350, 362.
People vs. Road Co., 9 Mich. 285, 307.
Cooley's Constitutional Limitations, 7th Ed. p. 838.
Brick Co. vs. Perry, 69 Kan. 300.
Howard vs. Schwartz, 77 Kan. 609.

The parts of the order sustained by the Kansas Supreme Court are void because the necessary effect is to increase the operating expenses of the packing company against its will, notwithstanding the income of the company was and is insufficient to pay the cost of raw material and operating expenses, including the increase of wages required to be paid by such order.

Reagan vs. Farmers Loan & Trust Co. 154 U. S. 362, 410.
Railway Co. vs. Mills, 253 U. S. 206.
Pa. Coal Co. vs. Mahon, 260 U. S. 393.

BRIEF AND ARGUMENT.

The Mandate and Judgment of This Court Required the Vacation of the Judgment of the Kansas Supreme Court as a Whole, and Did Not Authorize Its Modification Upon the Original Record Considered by This Court.

"Reversed" means to annul, set aside, vacate. In this case the judgment of this court reversed the final judgment of the Kansas Supreme Court and cannot be interpreted to mean that the judgment of the lower court was modified or affirmed in part.

Sec. 709 U. S. Rev. Stat., J. C. Sec. 237, Barnes Fed. Code Sec. 1002, reads in part as follows:

> "A final judgment or decree in any suit in the highest court of a state . . . may be re-examined and reversed or affirmed in the supreme court upon a writ of error. . . . The supreme court may reverse, modify, or affirm the judgment or decree of such state court, and may, in its decretion, award execution or remand the same to the court from which it was removed by the writ."

In this case the mandate reads in part:

> "On consideration whereof, it is now here ordered and adjudged by this court that the judgment of said supreme court in this cause be, and the same is hereby, reversed with costs; and that said defendant, The Chas. Wolff Packing Company, recover against said plaintiff Seven Hundred and Eighty-three Dollars and Five Cents for its costs herein expended and have execution therefor.
>
> "And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme

> Court for further proceedings not inconsistent with the opinion of this court."

Upon this record the packing company contends that upon receipt of this mandate the sole duty of the Kansas Supreme Court was to vacate the judgment which had thus been reversed. The remand for further proceedings, not inconsistent with the opinion, refers to subsequent action which might be taken by the parties, not to a re-examination of the same case upon the same record.

For example, if upon the vacation of the judgment the industrial court had filed a supplemental petition alleging facts and circumstances not covered by its former petition, and the Kansas Supreme Court had been thus advised of a change in the situation of the parties since the case was removed to this court, such proceedings could have been taken in the Kansas court upon such new matter as might be consistent with the opinion of this court. It is believed that this view is sustained by the decisions of this court authorizing further proceedings in a lower court after a judgment of reversal.

A well considered case discussing the legal effect of the reversal of a judgment is Cowdery vs. London and San Francisco Bank, 139 Cal. 293. In that case the mandate of the supreme court reversed the judgment of the lower court and remanded the case with directions to enter judgment in accordance with the views expressed in the opinion. Discussing the effect of this mandate, the California Supreme Court said:

> "The legal effect of the order of the supreme court was to reverse and vacate the judgment, and not merely to modify it. Upon a decision of the supreme court that there was material error in the action of

> the court below, that court may direct the character of subsequent proceedings in the lower court, and its mandate will vary according to its views as to the proper course to be pursued. It may conclude not to reverse the judgment, but to modify it by eliminating some portions, or by adding something to it, leaving the remaining part of the judgment below to stand affirmed and in full force and effect from the date of its original entry or rendition; or, it may reverse the judgment, which means to entirely vacate it, and may remand the cause for a new trial, or, if a new trial is not necessary, it may upon the reversal remand it, with directions to the lower court to enter a particular judgment."

After referring to the dictionaries and citing Laithe vs. McDonald, 7 Kan. 254 the court continued:

> "The distinction between a reversal of a judgment and an affirmance with a modification is too marked and radical to justify us in disregarding it."

In Davis vs. Healy, 22 N. J. 115, it was declared that unless the appellate court so directs, a reversal cannot be limited in effect to the part of the judgment which it found to be erroneous.

Counsel for the industrial court disputes this conclusion claiming that the following cases authorize the action taken in the Kansas Supreme Court: Mutual Life Insurance Co. vs. Hill, 193 U. S. 551; Gaines vs. Rugg, 148 U. S. 228, In re Potts, 166 U. S. 263; General Inv. Co. vs. Ry. Co., 269 Fed. 235, 240; Larabee vs. Ry. Co., 94 Kan. 683; In re Sanford Fork & Tool Company, 160 U. S. 247; Ex. Parte Union Steamboat Co., 178 U. S. 317; Erie Ry. Co. vs. Western Trans. Co., 204 U. S. 220; Hallanan vs. Eureka Pipe Line Co., 261 U. S. 393; and Public Utilities Commission vs. Landon, 249 U. S. 235.

Mutual Life Insurance Company vs. Hill, supra, ex-

presses what is believed to be the settled rule, that where the case is remanded and new proceedings had involving new matter not considered in the former appeal, the only question is whether such new proceedings are consistent with the opinion and judgment of the appellate court. In the case cited, on amended pleadings filed after the reversal, a volume of testimony was taken and a second judgment entered. Of course, in such circumstances, the new judgment must be considered with reference to the new testimony, as well as the previous judgment. Nothing of this kind appears on this record.

In Taenzer vs. Ry. Co., supra, the judgment was reversed, whereupon one of the parties asked and obtained leave to file an amended answer. The court of appeals, speaking through Circuit Judge Knappen, held that this was entirely proper because the new pleadings were not in the previous record and constituted a further defense, "not precluded by the former decision."

Gaines vs. Rugg was a remand with directions. The statement of the case plainly shows that further proceedings involving new matter were contemplated in the lower court.

In re Potts, supra, was a patent case in which this court reversed the judgment of the court of appeals and remanded the case for an accounting. This, of course, constituted new matter subsequent to the judgment of reversal, which was concluded by that judgment.

In re Sanford Fork & Tool Company, supra, Mr. Justice Gray delivering the opinion of the court held that it was proper for the lower court to allow an amendment to the pleadings after reversal, saying that "either upon an application for a writ of mandamus or upon a new appeal it

is for this court to construe its own mandate and to act accordingly."

It is said by counsel for the State that Hallahan vs. Eureka Pipe Line Co., supra, is controlling. In that case this court held a certain act void because it amounted to a regulation of inter-state commerce, as applied to oil originating in one state and carried to another one for sale or other disposition. The state court upon this mandate held the whole law invalid because of the invalidity of that part relating to inter-state commerce. This court, speaking through Chief Justice Taft, approved the action of the lower court, stating that the question whether the entire act was invalid was for the state court to determine. This rule lately was followed in the case of Dorchy vs. Kansas, 264 U. S. 286, where the judgment of the Kansas Court was reversed with directions to re-examine the statute in view of the decision of this court in Packing Company vs. Industrial Court. Further reference will be made to this case.

In the opinion of counsel for the packing company none of the cases relied upon by counsel for the industrial court affect the present situation. Here no subsequent proceedings introduced new matter, not contained in the original record. Instead of vacating the judgment as a whole the supreme court, upon the same record, without any change in the situation or attitude of the parties, modified it. None of the cases sustain the authority of a lower court to do this.

The Decision of the Kansas Supreme Court is Opposed to the Opinion and Judgment of This Court.

It is contended by counsel for the industrial court that the closing sentence of the opinion of this court not only

justifies, but requires, the Kansas Supreme Court to hold valid the parts of the order made by the industrial court relating to hours of labor and prescribing wages to be paid in case such hours of labor are exceeded. This closing sentence reads:

> "We think the Industrial Court Act, insofar as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law."

The argument of the industrial court, indicated in its briefs and pleadings addressed to the state court, is that this language fairly indicates that the act is not in conflict with the Federal Constitution in any other respect than in authorizing the industrial court to enforce arbitration of labor disputes by fixing wages; and therefore, that compulsory arbitration of disputes between employer and employees in the designated industries is authorized as to all matters in dispute except wages. This view appears to have been adopted by the Kansas Supreme Court. In its opinion of October 6, 1923, (Tr. No. 207, page 10) that court states that this court, "has not said that the Court of Industrial Relations Act was invalid, except insofar as it attempts to give power to fix wages . . . The judgment concerns wages only." (114 Kan. 304.) In its opinion on rehearing (Tr. No. 299, p. 14) 114 Kan. 487, the Kansas court sustains the validity of Sec. 8 of the Act creating the Industrial Court (Ch. 29 Special Session Laws 1920) insofar as it authorizes the industrial court to order changes in the matter of working and living conditions, hours of labor, rules and practices, declaring it to be invalid only as to the provision authorizing an order fixing minimum wages. Reference is made by the court

in its opinion to Bunting vs. Oregon, 243 U. S. 426, 436, as sustaining the validity of the section as applied to hours of labor; apparently on the ground that in that case this court distinguished between a legislative attempt to fix wages and a statute requiring employers and employees engaged in manufacturing pursuits to observe statutory hours of labor and penalizing employers who kept employees at work longer than the prescribed hours.

The packing company contended in the lower court, as it contends here, that this interpretation of this court's opinion and judgment is erroneous and not justified by the opinion taken as a whole; that the case considered by this court and upon which its opinion and judgment were rendered, was treated by the court and counsel as involving the power of the state of Kansas to provide a system of compulsory arbitration of industrial disputes between employers and employees engaged in the packing business; that the dispute from which the controversy arose and concerning which the order of the industrial court was made, involved a demand on the part of the employees for more wages than the packing company was willing to pay and the question of hours of labor and time and one-half for overtime was a mere incident to this dispute; that the argument in support of the validity of this statute depended upon the right of a state, under the Fourteenth Amendment, to exercise authoratative control over both parties in such cases by compelling the owners of packing houses and those employed in their operation to continue operating upon terms fixed by the industrial court as to wages and conditions of employment, depriving them of freedom to contract to that extent. Nothing in the opinion of this court indicates that it considered the Industrial Court Act otherwise than as a system of compulsory

arbitration in which the fixing of wages and hours of labor were details in the settlement of industrial controversies.

The questions decided by this court necessarily included the interpretation of sections 6, 7, and 8 of the Act, as well as the above general purpose and object to be attained.

Section 6 declares a public necessity for the reasonable continuity and efficiency of the enumerated industries and forbids any person from interfering with such operation for the purpose of evading the declared object and from doing any act that may limit or suspend the continuous and efficient operation of these industries. Section 7 provides that in case a controversy arises between employers and workers which "may endanger the continuity or efficiency of service of any of said industries . . . or affect the production . . . of the necessaries of life . . authority and jurisdiction are granted to said Court of Industrial Relations . . . to summon all necessary parties . . . to investigate . . . to make such temporary finding and orders as may be necessary to preserve the public peace and welfare and to preserve and protect the status of the parties, property and public interests involved pending said investigations".

It further authorizes the taking of evidence and the consideration of wages paid, the return to capital, the rights and welfare of the public, and all other matters affecting the conduct of the industries. It further provides that upon the conclusion of a hearing and investigation the industrial court shall make finding "stating specifically the terms and conditions upon which said industry . . . should be thereafter conducted insofar as the matters determined by said court are concerned."

Section 8 authorizes the industrial court to order such changes as are necessary to be made in the conduct of the industry "in the matters of work and living conditions, hours of labor, rules and practices, and a reasonable minimum wage, or standard of wages, to conform to the finding of the court in such matters, as provided in this act, and such orders shall be served at the same time and in the same manner as provided for the service of the court's findings in this act".

Concerning these sections this court said in its opinion (262 U. S. 522, 540):

> "The avowed object is continuity of food, clothing and fuel supply. By Section 6 unreasonable continuity and efficiency of the industries specified are declared to be necessary for the public peace, health and general welfare, and all are forbidden to hinder, limit or suspend them. Section 7 gives the industrial court power, in case of controversy between employer and workers which may endanger the continuity or efficiency of service, to bring the employer and employee before it and, after hearing and investigation, to fix the terms and conditions between them. The employer is bound by this act to pay the wages fixed and, while the worker is not required to work, at the wages fixed, he is forbidden on penalty of fine or imprisonment, to strike against them, and thus is compelled to give up the means of putting himself on an equality with his employer which action in concert with his fellows gives him.
>
> There is no authority of this court to sustain such exercise of power in respect of those kinds of business affected with a public interest by a change *in pais* . . . "

It is submitted that this interpretation and conclusion applies as well to orders fixing working and living conditions, hours of labor, rules and practices, as to a reasonable minimum wage, or standard of wages.

The Purpose and Object of the Industrial Court Act (Ch. 29, Special Session Laws 1920), is the Compulsory Arbitration of Disputes Between Employers and Employees in Designated Industries, Endangering Continuity of Operation of Such Industries. The Act is Not Concerned With the Health of Employes Engaged in Operating Such Industries.

The packing company further contended in the lower court, and now contends, that the whole structure of the Kansas statute is based upon the erroneous theory that the packing house business is so "affected with a public interest" as to be subject to regulation as prescribed in this act; and, that when this court held that this business was not so "affected with a public interest" it decided that the attempted regulation was not within the police power of the state, and was, therefore, invalid.

Originally it was claimed by counsel for the State that this legislation is supported by decisions of this court of which Munn vs. Illinois, 94 U. S. 113, is a type, and that the extension of the authority, established by these cases, to regulations such as the industrial court's original order attempted, were justified by the decision of this court in Wilson vs. New, 243 U. S. 332. It was not originally claimed that this statute was a mere regulation of wages and hours of labor in packing houses. The contention was that the power to fix wages, hours of labor and working conditions, was essential to the system of compulsory arbitration of industrial disputes which might endanger the flow of food supply from packing houses to consumers. Without the support of the decisions of this court in cases like Munn vs. Illinois, and Wilson vs. New, the arguments of counsel for the State, followed by the Kansas Supreme Court, had nothing upon which to depend.

The opinion and judgment of this court, as understood

by counsel for the packing company, denies all these arguments, interprets the act as providing a system of compulsory arbitration between owners and employees engaged in operating packing houses, and, as such, declares it to be an unconstitutional invasion of the freedom of the employer and its employees to contract upon the terms of employment upon which this plant might operate. This conclusion is confirmed by the decision in Dorchy vs. Kansas, 264 U. S. 286, of which neither the Kansas Supreme Court nor counsel for the parties had the benefit at the time these present cases were argued and decided in the lower court. That case arose upon the conviction of Dorchy for a violation of Section 19 of the Act creating the Industrial Court, (Ch. 29, Special Session Laws 1920). This section prohibits strikes, lockouts, etc. Dorchy and others combined to bring about a strike in the coal mining industry. The judgment of conviction sustained by the Kansas Supreme Court was reversed and the case remanded to enable the Kansas court to pass upon the question whether Section 19, "being an intimate part of the system of compulsory arbitration held to be invalid, falls with it". In that case this court pointed out that at the time of the decision of the Dorchy case the decision of this court in Wolff Packing Company vs. Industrial Court had not been announced; that in that case this court declared "that the system of compulsory arbitration as applied to packing plants, violates the Federal Constitution"; and, that it was proper that the Supreme Court of Kansas should determine whether Section 19 was severable from the objectionable parts condemned by this court, saying: "Whether Section 19 is so interwoven with the system held invalid that the section cannot stand alone, is a question of interpretation and of legislative intent", which

primarily was to be determined by the state court.

In the Dorchy case the court again determined the purpose of this statute, as follows: 264 U. S. 286, 288:

> "The purpose of the statute is to insure continuity of operation in coal mining and other business declared to be affected with a public interest. The means provided for accomplishing this is a system of compulsory arbitration of industrial disputes. The instrument is the so-called industrial court. Upon it is conferred power to investigate all matters involved in such controversies, to make findings thereon; to issue such orders as it may deem needful, fixing the wages to be paid, the hours of work, the rules for work, and the working and living conditions. The provisions in aid of the enforcement of this system are both comprehensive and detailed. The employer is prohibited, among other things, from limiting or ceasing operations with a view to defeating the purpose of the statute."

Having interpreted the statute, the court in Dorchy's case said, that in Wolff Packing Company vs. Industrial Court, "This court declared that the system of compulsory arbitration, as applied to packing plants, violates the Federal Constitution. For the reasons there set forth, it is unconstitutional also as applied to the coal mines of that state".

Since this decision the Kansas Supreme Court has again decided the Dorchy case, answering the question submitted to it by deciding that Section 19 is so far severable from the scheme of the legislation embodied in the act that it may stand alone and be regarded as having the legal effect of an independent statute, making it a punishable offense for an officer of a labor union to call a strike whereby the operation of a coal mine might be suspended. (State vs. Howat, et al., 116 Kan. 112.) This conclusion, did not receive the approval of all the justices. Mr. Justice Burch

and Mr. Justice Harvey dissented. But in the court's opinion it is again said that this act "undertook to provide a method of settling industrial disputes in essential industries . . . Justice was to be done between employer and employee, but protection of the public interest was to be paramount, and the public interest is not a subject of arbitration." The decision was that Section 28 provides a rule of interpretation which must be followed and that, for the purpose of giving that section effect, Section 19 must be regarded as having the legal effect of an independent statute. In his dissent Mr. Justice Burch points out that the effect of this decision is to sustain a provision of an act "although the act itself has become impotent to accomplish its purpose". Mr. Justice Harvey in his dissent remarks that the legislature only made the calling of a strike a criminal offense because the act had created a court which could hear the grievances of employees and make reasonable orders which could be enforced; and, that, when this purpose was held by this court to be unconstitutional, the whole scheme of the act failed.

Nothing in the decisions of the Kansas Supreme Court in the present writs of error expressly say that the provisions of Section 8, authorizing the industrial court in the settlement of labor disputes to fix hours of labor, is to be treated as an independent statute authorizing the industrial court to take jurisdiction of labor disputes to the extent of fixing hours of labor and providing wages to be paid for overtime. Nevertheless, this is the result of the decisions. Assuming that this court has decided the system of compulsory arbitration provided by this act to be unconstitutional, it is impossible to reconcile such a conclusion with the decisions of the Kansas Supreme Court

upholding the compulsory arbitration of this dispute between the packing company and its employees insofar as it requires the packing company and its employees to observe hours of labor fixed by the order and to pay the wages prescribed for overtime. No constitutional distinction is perceived, nor is any suggested by the opinion of this court, between the compulsory arbitration of a dispute between the owner and employees of a packing house relative to wages, and a dispute relative to hours of labor and the compensation employees shall receive if they work over the prescribed time. It seems illogical to contend that this system of compulsory arbitration is valid to the extent of enforcing settlement of industrial disputes relative to hours and conditions of labor and the payment of wages for overtime, but is invalid insofar as it authorizes settling such disputes by fixing the amount of wages the employer shall pay. The invasion of the constitutional rights of the employer and employee to contract as to the terms of employment is the same in either case. This court having decided that the Kansas legislature is without power to deprive owners and employees engaged in packing houses of liberty of contract in reference to their labor secured by the Fourteenth Amendment, the decision of the lower court holding that this act is valid to the extent that it deprives them of such liberty of contract in respect of hours of labor and pay for overtime is manifestly inconsistent with the judgment of this court and should be reversed.

Bunting v. Oregon, 243 U. S. 426, is Not Authority for Upholding the Order of the Industrial Court Fixing Hours and Conditions of Labor to be Observed by the Packing Company and Its Employes.

The reference by the supreme court in its judgment on rehearing, 114 Kan. 487, to the decision of this court in Bunting vs. Oregon, 243 U. S. 426, indicates that support is found in that decision for the conclusion that so much of Section 8 as authorizes the industrial court to fix hours is a valid exercise of the police power of the state to regulate the enumerated industries as provided by the industrial court statute.

The quotation from Bunting vs. Oregon, supra, 114 Kan. 489, 490, shows that the Kansas court relied upon that decision for the distinction which it makes between statutes fixing hours of labor and legislation prescribing wages. Upon this authority the supreme court said:

> "The order for time and one-half pay for overtime work is not an order fixing wages. The order of the court of industrial relations fixes eight hours for a day's work, but recognizes that at the same time it may become necessary to work more than eight hours in any one day, and to discourage such practice and to enforce the order for eight hours, imposes a penalty to be paid to the workmen for the overtime work."

Shortly stated, the Kansas court upholds Section 8 insofar as it authorizes the industrial court to require employees in packing houses to work no more than eight hours in any one day, or not more than forty-eight hours in any one week, and to compel obedience to this order provides that if the employer requires the service of employees for more than eight hours the wages shall be increased fifty per cent for the overtime.

The distinction between the Oregon statute sustained in Bunting vs. Oregon, and the Kansas industrial court statute held invalid by this court is obvious. The Oregon statute forbids the employment of any person in any

mill, factory or manufacturing establishment, more than ten hours in any one day, and provides for payment for overtime, not exceeding three hours in any one day, at the rate of time and one-half of the regular wage. The Kansas statute provides that in case a controversy shall arise between employers and employees engaged in the packing house business, upon complaint of either party to such controversy, or upon its own motion, the industrial court shall investigate the dispute and make findings, "stating specifically the terms and conditions upon which said industry . . . should be thereafter conducted . . ." It further gives the industrial court authority to make such changes in the conduct of the industry, "in the matter of working and living conditions, hours of labor, rules and practices, and a reasonable minimum wage, or standard of wages to conform with the findings of the court in such matters . . . such orders shall be served at the same time and in the same manner as provided for the service of the court's findings in this act."

The Oregon statute is a comprehensive regulation applying to all mills, factories and manufacturing establishments, while the industrial court statute applies only in case a controversy arises between employers and employees in industrial establishments which may endanger the continuity of operation of such industries. Considering the Oregon statute, the supreme court of that state said that its intent was "to make ten hours a regular day's labor in the occupations to which reference is made"; and, that the statute was enacted in the interest of the health of the workers employed in such occupations. The Industrial Court Act does not apply to all packing houses and other establishments engaging in the preparation of food; it applies only to plants in the operation of which controversies

have arisen between employers and employees, which may endanger continuity of operation, until such controversy arises the statute has no field in which to operate. All of the packing houses in Kansas may, so far as this statute affects their business, enter into contracts with their employees for more than eight hours work each day, and the liberty of such packing house owners and their employees in respect of such contracts is unimpaired by this statute until and unless such a controversy arises. All manufacturing enterprises and establishments in the state and their employees enjoy this freedom. It results that this statute justly cannot be said to have been enacted for the protection of the health of employees engaged in the packing house business, because that is neither its expressed object, nor does it provide for its attainment. Its sole purpose is the compulsory arbitration of industrial disputes. If such a dispute arises but does not involve any disagreement as to hours of labor, the industrial court is not authorized to make any order affecting hours of labor. The jurisdiction of the industrial court granted by this statute is limited to the matters covered by the complaint which may be filed under Section 7. This is illustrated in the present litigation. In the original complaint filed by the Butcher's Union in the industrial court there were no allegations sufficient to sustain nine of the paragraphs in the order as finally made by the industrial court. Accordingly, the Kansas Supreme Court sustained the objections of the packing company to these nine paragraphs upon the authority of Section 10 of the Industrial Court Act which provides for notice to the opposite party of the substance of the matter to be investigated; that the notice served in this case on the packing company was, as provided by that section, a copy of the complaint; that the complaint

does not show that the subjects covered by the nine paragraphs were in dispute; and, therefore, the industrial court had no jurisdiction to make any order concerning them. (See original transcript in case No. 739 Oct. Term, 1922, printed pages 145, 146, 147, 148 and 149.) In its opinion the supreme court said:

> "However, it should be stated that if in the course of its investigation, matters that ought to be considered should come to the knowledge of the court, it may investigate them and make orders concerning them after taking the necessary steps to acquire jurisdiction."

In the second paragraph of the syllabus, which under the laws of Kansas is required to state the points of law decided by the court, it is said:

> "The court of industrial relations cannot make orders to be observed by the operators of a packing house plant beyond the matters embraced within the notice given, unless the operators consent that matters outside the notice may be investigated."

Section 10 of the Industrial Court Act providing for this notice makes it a condition precedent to any hearing, trial or investigation and provides:

> "Such notice shall contain the substance of the matter to be investigated, and shall notify all persons interested in said matter to be present at the time and place named to give such testimony or to take such action as they may deem proper."

From these provisions of the statute, as interpreted by the Kansas Supreme Court, it is clear to demonstration that the act is not intended as a general regulation of the hours of labor in packing houses, or the other enumerated industries, but is, what this court and the Kansas Supreme

Court both have stated it to be, a comprehensive system of compulsory arbitration of industrial dispute.

In the opinion of counsel for the packing company the plain distinction between the purpose and object of the Industrial Court Act and of the Oregon statute, deprives the decision of this court in Bunting vs. Oregon of any authoritative force as sustaining the provisions of Section 8 of the Industrial Court Act authorizing the industrial court, in controversies properly brought before it, to fix hours of labor and require employers to pay their employees wages at the rate of time and one-half for overtime.

In Myer vs. Nebraska, 262 U. S. 390, 399, Mr. Justice McReynolds, delivering the opinion of this court, said:

> "The established doctrine is that this liberty (referring to liberty of contract) may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary, or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to the supervision of the courts."

In this case the decision of the Kansas court cannot be sustained under the guise of protecting the public interest by providing limited hours of work for employees in packing companies under a statute which is an arbitrary and unreasonable attempt to enforce compulsory arbitration of industrial disputes. The mere fact that the Kansas legislature authorizes an administrative tribunal, after hearing involving such a dispute, to fix hours of labor to be observed by employers engaged in the packing house business does not justify the conclusion that the statute may be upheld as a police regulation in the interest of the health of the employees engaged in that business.

Considered as a Statute Authorizing an Order Fixing Hours and Conditions of Labor to be Observed by the Packing Company and its Employees, the Act Creating the Court of Industrial Relations, as Applied to the Plaintiff in Error and Its Employees, Violates the Fourteenth Amendment to the Constitution of the United States and is, Therefore, Void.

The decision of the Kansas Supreme Court enforcing an order of the industrial court requiring the packing company and its employees to observe an eight-hour working day, as stated in the order, and providing that the packing company should pay its employees time and one-half for overtime, confessedly deprives the packing company and its employees of the freedom to contract in respect of the number of hours the employees should work in a day, and also in respect of the amount of wages the packing company should pay. Except for this order, the packing company and its employees lawfully could enter into an agreement fixing the number of hours the employees should work and providing what, if anything, the employer should pay in the event the requirements of the business necessitated longer hours. Is this order depriving the packing company and its employees of this freedom to enter into contracts in relation to the labor of the employees a constitutional exercise of the police power; or, is it an unwarranted and unreasonable invasion of the constitutional rights of the packing company and its employees?

It is believed that this question, insofar as the Industrial Court Act provides a system of compulsory arbitration of industrial disputes, must be answered by holding that the act being unconstitutional as such as system, the order is invalid; but considered independently of this interpretation, counsel for the packing company contend that it is an unconstitutional invasion of the right freely to

contract, in respect of the terms of employment secured to it and its employees by the Fourteenth Amendment.

There are several decisions of this court which must be considered if this statute is to be treated as an independent act authorizing the industrial court to fix hours of labor in this packing house in the interest of the public health, or, of the health of employees in that occupation.

The right of a state to limit hours of employment in the interest of the health of employees was considered by this court in Holden vs. Harding, 169 U. S. 366. In that case the court dealt with an act of the Utah legislature restricting the hours of labor in mines and smelters. The statute was sustained as a legitimate exercise of the police power, on the ground that the legislature had determined that these particular employments, when too long pursued, were injurious to the health of the employees, and, as there were reasonable grounds for supporting this determination, the decision of the state court in that respect was beyond the reviewing power of this court.

In Lochner vs. New York, 198 U. S. 45, this court reviewed a state statute restricting the employment of all persons in bakeries to ten hours in any one day. It held the statute unconstitutional as an unreasonable, unnecessary and arbitrary interference with the liberty of contract, and, therefore void under the constitution.

Bunting vs. Oregon, 243 U. S. 426, has already been considered. It suffices now to say that this court upheld an Oregon statute forbidding the employment of any person in any mill, factory or manufacturing establishment more than ten hours in any one day, and providing payment for overtime at the rate of time and one-half of the regular wage.

Wilson vs. New, 243 U. S. 332, involved the establishment by Act of Congress of an eight-hour day for employers of inter-state carriers, and fixed a scale of minimum wages with proportional wages for overtime to be enforced, however, for a limited period.

Perhaps, it is difficult, if not impossible, to reconcile the decisions in these cases. Lately in Adkins vs. Childrens Hospital, 261 U. S. 525, which involved the validity of an Act of Congress authorizing a commission to fix wages of women employed in the District of Columbia, these cases were reviewed, but, as the decision of that case did not require the final conclusion of this court as to the validity of statutes fixing hours of labor, the question, perhaps, is still to be settled. Counsel for the packing company confesses his inability to distinguish the impairment of the constitutional freedom of contract by a statute attempting to fix wages to be paid by an employer to an employee, from the restriction of a statute which invades this freedom to the extent of forbidding the employer and employee to contract with reference to hours of labor.

In this case the Commissioner appointed by the supreme court to take the evidence and report his finding, stated in Finding of Fact No. 6 (Tr. in Case No. 739 Oct. Term 1922, pages 121, 122), that because of the limited capacity of the packing company's plant it is impracticable to operate with shifts of workmen; and, therefore, on some days the operation of the greater part of the plant necessarily occupied only a few hours and on others more than eight and even more than nine hours, depending largely upon the amount of live stock on hand for killing, and, that this condition is one that cannot be controlled by the pac ing company; that the operation of the plant did not a d sufficient working hours per week to hold the men

if those in the killing gang were not afforded other work in the plant besides the actual killing; and, that since the abolishment by the packing company of extra pay for time over eight hours the number of hours of work per day had not changed materially. He concluded this finding, as follows:

> "Therefore, the Commissioner finds that the hours of employment of the workers generally in the plant are governed by conditions over which the respondent has not practical control, and that the only effect of the establishment of a basic eight hour day in the court's order would be upon the rate of wages required to be paid; that however it might be regarded in other cases, a basic day in this order is a wage provision rather than a working condition."

Nothing in the decisions of the Kansas Supreme Court upon the exceptions to the Commissioner's report indicate that this finding was not accepted as fairly reflecting the result of the Commissioner's investigation into the facts. It, therefore, appears that both wages and hours of work necessarily enter into the consideration given by the packing company and received by its employees when dealing with the question of hours of labor. A restriction as to wages in this particular case is not any greater in its essential effect upon the freedom of contract than a restriction as to hours of labor. Both restrictions are of the same kind. As said by Chief Justice Taft in his dissenting opinion in Adkins vs. Children's Hospital, "one of these is the multiplier and the other the multiplicand". It is hoped and expected, therefore, that if this court finds it necessary to deal with this statute as a so-called labor legislature in the interest of the health of workers in this packing house it will determine that a state statute authorizing the settlement of industrial controversies by fixing

hours of labor to be observed in packing plants, is as obnoxious to the freedom of contract assured by the Fourteenth Amendment as an order fixing wages to be paid in such establishments.

As the statute considered in Lochner vs. N. Y. more nearly resembles what is now said to be the valid part of Section 8 of the Act creating the Court of Industrial Relations, it is believed that the decision in that case is strict authority for deciding against the validity of this provision of the Kansas statute. The section of the New York statute there under consideration was:

> "No employee shall be required or permitted to work in a biscuit, bread or cake bakery, or confectionery establishment, more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work." (Sec. 110 New York Labor Law. See marginal note p. 46, Lochner vs. N. Y., 198 U. S. 45.)

The argument for the state in support of the statute maintained that it was a proper exercise of the police power; that the state had plenary power to decide what laws are necessary to secure the public health, safety or welfare, and the courts should take judicial notice of the common belief of the people upon that subject. The argument of the opinion of the New York Court of Appeals was that the unhealthful character of a baker's occupation was common knowledge; that that as the statute admitted of two constructions as to being a health measure, or otherwise, the courts should give the construction which sustains the act.

The decision of this court was delivered by Mr. Justice

Peckham. He pointed out, as was remarked in the original opinion in this case, that the statute necessarily interferes with the right of contract between the employers and employees, concerning the number of hours in which the employee may work in the bakery of the employer; and, that the general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. With reference to Holden vs. Hardy, 169 U. S. 366, it was said that the kind of employment regulated in the Utah statute, mining, smelting and the like, and the character of the employees in such labor, made it reasonable and proper for the state to interfere to prevent the employee from being constrained by rules laid down by the proprietors in regard to labor; that the law applied only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other work of the production of mining ores.

Pressed with the argument that the New York statute was valid as a labor law, this court said (p. 57):

> "The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety,

> the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.
>
> It is a question of which of two powers or rights shall prevail—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

It appears from the report of the case that much diversity of opinion existed among the judges of the New York courts as to the validity of the statute as a health law. The Court of Appeals upheld the act as one relating to the public health—in other words, as a health law. One of the judges stated that while the evidence was not uniform, it led him to the conclusion that the occupation of a baker was unhealthful and tended to result in disease of the respiratory organs. Three of the judges dissented from that view, and they thought the occupation of a baker was not to such an extent unhealthful as to warrant the interference of the legislature with the liberty of the individual.

This court concluded that the limit of the police power had been reached and passed by the New York statute; that there was no reasonable foundation for holding the

act to be necessary or appropriate as a health law to safeguard the public health or the health of individuals following the trade of a baker; that if the statute was valid and a proper case made out in which to deny the right of an individual *sui juris*, as employer or employee, to make contracts for the labor of the employee under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go.

Answering the argument that it is to the interest of the state that its population should be strong and robust, and, therefore, legislation which may tend to make people healthy must be held valid as health laws, the court said:

> "If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty or person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employes, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes, and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law . . . Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of

> itself, to say that there is material danger to the public health, or to the health of the employees, if the would be recognized and upheld."

In another place, answering the argument that restricting the hours of labor in bakeries was proper because it tended to cleanliness on the part of the workers, the court said:

> "We do not admit the reasoning to be sufficient to justify the claimed right of such interference. The state in that case would assume the position of a supervisor, or *pater familias*, over every act of the individual, and its right of governmental interference with his hours of labor, his exercise, the character thereof, and the extent to which it shall be carried would be recognized and upheld."

When it is remembered that the New York statute dealt with an industry engaged in the preparation of food for human consumption, just as the packing company in this case is engaged in the preparation of food for human consumption, this authoritative language is most appropriate. Granting to the Kansas legislature the power to authorize the industrial court to fix hours of labor in packing house and other industries enumerated in the statute, on the ground that such a regulation may tend to the cleanliness of the employees whose hours of labor are thus restricted, or to the cleanliness of the product which they turn out, would be subversive of the freedom of the individual in controlling his own affairs. It cannot be reconciled with any proper conception of the constitutional safeguards protecting the individual from legislative attempts to deprive him of his liberty and his property.

It would serve no useful purpose to review the number of cases in which this court has condemned such legisla-

tion. Most of them are collected in Meyer vs. Nebraska, 262 U. S. 390, 399.

In justice to the Kansas Supreme Court, it should be said that its original judgment in this case was entered before the decision of this court in the District of Columbia wage case, 261 U. S. 525, and also before the decision in Meyer vs. Nebraska, 262 U. S. 390. It will be remembered that Mr. Justice Marshall, delivering the majority opinion of the court in the original case, remarked that Lochner vs. New York appeared to have been overruled by Bunting vs. Oregon. It appears now from the decision of this court in Adkins vs. Children's Hospital, supra, that the decision in Lochner vs. New York is the settled law constraining state legislatures within constitutional limitation in attempting to invade the freedom of contract secured by the Fourteenth Amendment.

Counsel for the packing company respectfully submit that upon the authority of Lochner vs. New York, even if the statute in question be deemed an attempt to regulate hours of labor in packing houses on the ground that such legislation is in the interest of the public health, cannot be upheld; and, that the act should be declared unconstitutional in respect of this provision, as well as the provisions providing for the compulsory arbitration of industrial controversies, by fixing wages to be paid to employees of packing houses.

The Parts of the Order Sustained by the Kansas Supreme Court Are Void Because the Necessary Effect is to Increase the Operating Expense of the Packing Company Against its Will, Notwithstanding the Income of the Company Was Void and is Insufficient to Pay the Cost of Raw Material and Operating Expenses, Including the Increase of Wages Required to Be Paid by Such Order.

It is deemed unnecessary to review the many decisions of this court holding that whenever it is made to appear that an owner of property, subject to State regulation, cannot pay expenses of operation, out of revenue from operation, the restraint of the Fourteenth Amendment forbids regulation in any form, or on any pretext which increases his loss, for the constitutional reason that power to regulate does not include the right to take the owners property and hand it over to the public, or for a public purpose, or to another private individual.

Assuming the application of this settled principle to this case, the attention of the court is directed to the evidence and the Commissioner's report, showing the effect of the application to the business of the Packing Company of the order directing that an eight hour day be observed in this plant, with time and one-half paid for overtime. This evidence will be found in the transcript in case No. 739, October Term 1922, pages 56, 315, Exhibit E, 242-3; also pages 227-228, 239-240, and the Commissioner's Finding No. 7, at page 122. See also Commissioner's Finding No. 9, and exhibits B and E at pages 239-240-241-242-243-244. Summarizing this evidence and findings discloses that for three years prior to the making of the Industrial Court order, the Packing Company did not make any profit or gain from its operations but suffered an actual loss of several hundred thousand dollars; that its receipts from

the sale of its products were insufficient during that period by many thousand dollars to pay the cost of raw material and the expense of preparing and placing its products on the market. This evidence and finding shows that the Packing Company is obliged to sell its products in a highly competitive market, not only in the State of Kansas, but in other states, and that for more than three years the operators of the property have not earned, and the stockholders have not received, any dividends. Coming to the effect of the order, the Commissioner finds that the increase in operating expenses resulting from the application of the order directing the observance of an eight hour basic day, with time and one-half for overtime, would amount to 4.8 per cent of the payroll applicable to the employees affected by the order, or $16,226.00 per annum; and, in view of the Commissioners finding that "the only effect of the establishment of a basic eight hour day in the courts order would be upon the rate of wages required to be paid; that however it might be regulated in other cases, the basic day in this order is a wage provision, rather than a working condition" (Tr. Case No. 739, Oct. Term 1922, page 122), it must be concluded that this attempted regulation takes from the packing company $16,226.00 each year and gives that amount to its employees for the declared purpose of subserving the public interest. The Packing Company respectfully insists that this cannot be done in the circumstances shown by this record.

In the cases upholding the power to regulate the operation of private property in the public interest, the limitation upon the exercise of the power is as firmly established as the power itself. Such property belongs to the owner precisely the same as any other property belongs to its owner. Therefore, legislation regulating the use or

operations of such private property is not a transfer or assignment of the property from its owner to the public. All regulations of this character affect net income from operations. Net income may be affected in but two ways: One by increasing or decreasing the receipts from sales or services; and, the other, by increasing or decreasing the expenses for raw material and preparing and marketing the products. In the so-called rate cases, involving legislative regulation of charges to be paid by the public, net revenue is affected by increasing or decreasing the reward or compensation which the owner shall receive for his services. In the present case the net revenue of the Packing Company is affected by this attempted regulation by increasing the expenses of production. It is obvious that identical effects on the owner of the property are produced by either method. Where net revenue is decreased by legislation, decreasing the rates or charges for services to the public, the owner, under all of the cases decided by this court, justly may complain if such legislation reduces the net revenue below the cost of the service. In this case the Packing Company, for like reasons, and upon like authority, justly may complain that this order, by increasing the expense of operation, decreases the Packing Company's net revenue below the cost of production. The decisions of this court settle the law to be that no Board or Legislative Commission has or can have the power to compel the owner of private property to *donate* the use of his property to the public. He is entitled, as a matter of constitutional right, to some compensation, and legislation attempting to deprive him such right is void, whatever may be the excuse offered for its enactment.

The contentions of counsel for the State on this point appear to be that in the administration of statutes en-

acted in the interest of the public health, safety or welfare, the pecuniary effect upon the individual property owner cannot be considered if the statute is otherwise valid. This broad statement cannot be accepted as consistent with the rules established by the decisions of this court. The case upon which counsel for the State chiefly rely, Wilson against New, itself shows the limits of the legislative power to enforce regulations affecting the operation of private property. In that case Mr. Justice McKenna, specially concurring, remarked (Wilson vs. New, 243 U. S. 251-263):

> "To a carrier a wage law is but an item in its accounts, requiring it may be, an adjustment of its operations, the expense to be recompensed through its rates. If it be said that rates cannot be changed at will but only by permission of authority, I cannot think that permission will not be given if it be necessary to fulfill the command of the law. Indeed, if not given, the law might encounter constitutional restrictions."

In this case the Commissioner (Tr. Case 739, page 131) in his conclusions of law said:

> "There is nothing in the act justifying the taking of property of the employer in one of the designated industries for the purpose of enabling the workmen to receive a fairer wage, any more than the taking of fair wages from the workman to enable the employer to earn a fairer return on his invested capital . . . If the respondent were making a substantial return on his investment in operating this plant . . . and were not paying fair wages to its workmen, the situation would be one for the Industrial Court to equalize in the interest of the general public. But where, as in this case, the respondent is getting no return whatever on its investment, and the workmen are receiving wages, not as high as some paid in the larger packing houses, but equal to those paid a year before, when costs of living were somewhat higher, an increase is

> not justified nor authorized by the Industrial Court law, and the execution of those parts of the order (including the paragraphs making a basic day and giving time and one-half for over-time) would be unreasonable and should not be enforced."

In Ft. Smith Railroad Company vs. Mills, 253 U. S. 206, it was sought to compel a railroad company to observe the provisions of the Adamson act sustained in Wilson against New. It appears that the Railroad Company was not making operating expenses. This court sustained an injunction forbidding the application of the Adamson act, saying that that statute was enacted by Congress to meet an emergency, and that Congress could not require a railroad to continue operating at a loss. Special reference is made to the great opinion delivered by Mr. Justice Brewer in Reagan vs. Farmers Loan & Trust Company, 154 U. S. 362, where this court condemned the order of the Texas Railroad Commission fixing railroad rates, the effect of which was further to increase the losses of the railroad to which it applied. When pressed with the argument that the agricultural interests of Texas required lower railroad rates, this court said:

> "They who invest their money in railroads take the same chances that men engaged in other business do of making profit from the carrying on of their business, and as appears from other cases submitted to us with this, some of the railroads in the State of Texas have operated at a constant loss. But such possibilities of loss are simply the natural results of all business freely carried on, against which the law is powerless to afford protection. Very different are the considerations which arise when the strong arm of the law is invoked to compel parties engaged in legitimate business, and business which cannot be abandoned at will, to so reduce their charges for services as to make the carrying on of that business result in a continued

> loss. In the one case the law is powerless to prevent injury. In the other it is used to work injury."

To the suggestions of counsel that the State itself might operate the railroad and make rates so low that the business would be done at a loss, as in the case of the postal system of the United States, carried on for the common welfare the court said:

> "But the parallel is not good. In the case suggested the loss is cast through taxation upon the general public, and all bear their proportional share of that loss which is incurred in securing a common benefit, while the scope of this legislation is to secure such common benefit at the expense of a single class. The equal protection of the laws, the spirit of common justice—forbids that one class should by law be compelled to suffer loss that others may make gain."

Conclusion:

In closing, counsel for the Packing Company respectfully submit that the effect of this court's opinion and judgment in the original case precludes administrative orders by the Industrial Court designed to effect the compulsory arbitration of disputes between owners and employees of packing houses; that this results from the incompetency of the legislature to interfere with the freedom of contract of employer and employees engaged in the packing house business, in respect of the terms upon which such employees shall give their time, skill and labor to the operation of the property. If counsel for the Packing Company are correct in this interpretation of this court's decision and judgment, these writs of error should result in a reversal of the judgments entered by the Supreme Court of Kansas enforcing, in part, the order of the In-

dustrial Court of Kansas, arbitrating the dispute between the local Union of Butchers and the Packing Company.

If, on the other hand, this court intended by its decision, and the closing sentence of its opinion, to declare constitutional and valid the system of compulsory arbitration provided by the act creating the court of industrial relations, except as to fixing wages to be paid by packing companies to employees, then these judgments should be affirmed, with such explanation as may be necessary, in the opinion of the court, to advise the packing industry of the extent of the authority to which it must lawfully submit; to the end that operators and workers in packing houses in Kansas may understand that in case controversies arise between them which may endanger continuity or efficiency of service to the public, and which involve matters of working and living conditions, hours of labor, rules and practices, including wages to be paid for overtime, they are subject to the supervision and control of the industrial court.

D. R. HITE,
JOHN S. DEAN,
HARRY W. COLMERY,
Attorneys for Plaintiff-in-Error.

October, 1924.

APPENDIX.

In the Supreme Court of the State of Kansas

No. 23702.

THE COURT OF INDUSTRIAL RELATIONS OF THE STATE OF KANSAS, Plaintiff,

vs.

THE CHAS. WOLFF PACKING COMPANY, Defendant.

SPECIAL APPEARANCE OF DEFENDANT TO PLAINTIFF'S MOTION FOR REHEARING AND MODIFICATION OF JUDGMENT ENTERED IN THIS CAUSE ON OCTOBER 6, 1923.

The Chas. Wolff Packing Company, the above named defendant, appears specially and for the purpose of protesting and objecting to the exercise by this Court of any jurisdiction in this cause, and to entertain or pass upon the motion of the plaintiff filed herein on October 22, 1923, for rehearing and modification of the judgment entered by this Court on October 6, 1923.

This defendant respectfully shows to the Court:

(1) That heretofore, on October 6, 1923, this Court duly entered its judgment herein that a preemptory writ of mandamus issue, directed to this defendant, requiring it to put into effect the following parts of the order of the Court of Industrial Relations, dated May 1, 1921, to-wit:

"3. A basic working day of eight hours shall be observed in this industry; but a nine hour day may be observed not to exceed two days in any one week without penalty.

14. Workers paid by the week or day, if employed within the plant and not within the office or sales department, shall be subject to hours of work . . . as others employed.

19. In departments operating twenty-four hours a day and seven days a week, such employee therein shall be entitled to one day off each week.

This order shall . . . continue in force until changed by the Court (the court of industrial relations) or changed by agreement of the parties with the approval of the court (the court of industrial relations.)"

(2) That on or about Wednesday, October 10, 1923, Hon. John G. Egan, of counsel for the plaintiff, in a conversation over the telephone with D. R. Hite, Esq., counsel for the defendant, called attention to the fact that the writ of error to this Court from the United States Supreme Court in the matter of State vs. Dorchy, would probably be heard in the Supreme Court of the United States late in November or early in December of this year, and requested counsel for the defendant to so proceed with the removal of this cause from this Court to the United States Supreme Court as to request the Supreme Court of the United States to advance the hearing of the defendant's proposed writ of error in this cause so that the case of Dorchy and this case on writs of error, might be heard at the same time, for convenience of counsel for the State of Kansas, and the plaintiff; that during such conversation no suggestion or intimation was made of the purpose of the plaintiff to file a petition herein for a rehearing; but, on the contrary, the intima-

tion and inference was that no such petition would be filed. Pursuant to such suggestions of counsel for the plaintiff, the defendant expedited the application for a writ of error herein and on October 11, 1923, duly presented to the Chief Justice of this Court its petition for a writ of error; its assignments of error, and its bond in the sum of $20,000.00 to act as a supersedeas; and on said day the Chief Justice of this Court duly allowed said writ of error and duly approved said bond to act as such supersedeas; and, on said day there was duly filed in this Court defendant's petition for writ of error; the allowance of such writ of error by the Chief Justice of this Court; a supersedeas bond in the sum of $20,000.00, and a writ of error issued by the Clerk of the United States District Court for the District of Kansas, directed to this Court; and on October 12, 1923, there was duly served upon the counsel of record for the plaintiff a citation duly signed by the Chief Justice of this Court; and thereupon, the defendant alleges that on October 12, 1923, by virtue of said allowance of said writ and of said writ, said bond and said citation, this cause was removed from this Court and ever since has been and is now pending in the United States Supreme Court, and this Court has no jurisdiction whatever to entertain said petition for a rehearing and for a modification of the judgment covered by said writ of error.

(3) This defendant further shows to the Court that having thus removed said cause to the Supreme Court of the United States it has incurred costs and expenses and that any modification of the judgment of this Court entered on October 6, 1923, necessarily involves such costs and expenses.

(4) This defendant further shows to the court that the petition for a rehearing in this cause was not filed in this Court until October 22, 1923, although a copy of the proposed petition for rehearing was duly given to counsel for the defendant on Friday, October 19, 1923.

The premises considered, the defendant respectfully prays that this Court ascertain and determine the facts to be as hereinbefore alleged, and thereupon proceed no further in this cause for want of jurisdiction to take any action whatsoever affecting the judgment from which the said writ of error was taken.

This defendant having protested and objected to the jurisdiction of this Court to entertain said petition for rehearing and for a modification of the judgment of October 6, 1923, directs the attention of this Court to the following reasons why said petition should be dismissed for want of jurisdiction, to-wit:

In the case of Ensminger vs. Powers, 108 U. S. 292, 304, an appeal was perfected by giving the necessary bond for costs in January, 1874. The transcript was not filed and docketed in the Supreme Court and the appeal was therefore dismissed for that reason. After the appeal was taken a bill of review was filed in the lower court and the question in the United States Supreme Court was as to jurisdiction of the trial court to entertain such bill of review. Upon this question the Court said:

> "While the appeal was pending here, although there was no supersedeas, the circuit court had no jurisdiction to vacate the decree, in pursuance of the prayer of a bill of review, because such relief was beyond its control."

In First National Bank vs. State National Bank, 131 Fed. 430, the United States District Court rendered its

judgment upon its merits on August 17, 1903. On August 25, 1903, an appeal was perfected to the United States Circuit Court of Appeals for the Ninth Circuit. On September 12, 1903—18 days after the appeal was perfected—a petition for rehearing was filed on the ground of newly discovered evidence. The rehearing was denied and an attempt made to appeal from the order denying the rehearing. It was contended in the appellate court that an appeal properly perfected absolutely removes the case from the trial court and places it in the appellate tribunal. On this point the Court said:

> "The overwhelming weight of authority of the state courts is that an appeal, properly perfected, absolutely removes the case from the trial court, and places it in the appellate tribunal. The case must, of necessity, either be in the appellate or lower court. It cannot very well be in both courts at the same time. Such a course would lead to endless confusion. Under all the ordinary rules of practice, the appellate court alone would have the jurisdiction. After the cause leaves the lower court, it is deprived of taking any action upon any question involved in the appeal. Many of the authorities in the state courts upon this point are collected and cited in Elliott's App. Pro. 541. The federal authorities are substantially to the same effect . . . This rule is frequently stated in admiralty and other causes. The Collector, Wilmot, Claimant, 6 Wheat. 194, 203, 5 L. Ed. 239; Bronson vs. Railroad Co., 1 Wall. 405, 17 L. Ed. 616; The Lottawanna, 20 Wall. 201, 225, 22 L. Ed. 259; The S. S. Osborne, 105 U. S. 447, 450, 26 L. Ed. 1065; Ensminger v. Powers, 108 U. S. 292, 302; 2 Sup. St. 643, 27 L. Ed. 732; Hovey vs. McDonald, 109 U. S. 150, 157, 3 Sup. Ct. 136, 27 L. Ed. 888.

In Bronson vs. Railroad Co., supra, the Court said:

> 'They having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it pending the appeal. They assert the decree is founded in error, and for that

reason should not be executed, but should be reversed and corrected in the appellate tribunal. The appeal suspends the execution of the decree.'

In Ensminger vs. Powers, supra, the Court said:

'While the appeal was pending here, although there was no supersedeas, the Circuit Court had no jurisdiction to vacate the decree in pursuance of the prayer of a bill of review, because such relief was beyond its control.'

The decisions in the District and Circuit Courts are to the same effect. Morgan's Louisiana R. R. Co. vs. R. R. Co. (C. C.) 32 Fed. 525, 530; Kimberly vs. Arms (C. C.) 40 Fed. 548, 550; Citizens Bank vs. Farwell, 56 Fed. 539, 6 C. C. A. 30; Western W. S. Co. vs. Drinnen (C. C.) 79 Fed. 820; Morrin vs. Lawler (C. C.) 91 Fed. 693.

In Citizens Bank vs. Farwell, supra, the Court of Appeals said:

'After the cause had been thus removed into this court, the plaintiff-in-error appeared at a subsequent term of the Circuit Court, and filed a motion in that court to "vacate, set aside, and annul the said judgment" on various grounds. This motion the court overruled, and thereupon the plaintiff-in-error sued out this second writ of error in the same cause, and assigned for error the overruling of said motion. The removal of the case into this court under the first writ of error transfered the jurisdiction of the suit to this court, and the jurisdiction of the lower court over the case was at an end.'

In Morrin vs. Lawler, supra, Thomas, J., said:

'When all the steps necessary to perfect an appeal to an appellate court have been properly taken, the action is within the control of that court, and the trial court should not engage in undoing or modifying the proceedings by which such jurisdiction has been obtained.'"

Upon these cases this petition for a rehearing should be dismissed for want of jurisdiction.

On the Merits of the Petition.

The contention of the plaintiff is founded upon the case of Bunting vs. Oregon, 243 U. S. 426, and the claim is made that it is supported by the recent decision of the United States Supreme Court in Adkins vs. Children's Hospital, decided in April, 1923. The distinction to be taken between such cases and the case at bar is the same distinction which must be taken between the statute under consideration in Bunting against Oregon, and the statute creating the Court of Industrial Relations. The Oregon statute was enacted for the preservation of the health of workmen in factories. The act creating the Court of Industrial Relations was enacted for the compulsory settlement of controversies between employers and employees in certain industries which the statute declared to be affected with a public interest. This distinction is pointed out and discussed at some length in the defendant's brief on its motion to record the mandate filed in this court, beginning at page 23. Among other things, attention is drawn to the leading case in the Supreme Court of the United States concerning the right of a state to interfere with the freedom of contract between workmen *sui juris* and their employers in the matter of hours of labor. This is the case of Lochner vs. New York, 198 U. S. 45. That case involved the validity of a New York statute prescribing that employees in bakeries should not be required to work longer than 10 hours a day. Interpreting this statute, the New York Court of Appeals held that the statute was enacted in the interest of the health of workmen in bakeries. The Supreme Court of the United States refused to follow this interpretation and held that the state had no right to deprive citizens of the right to work as long as they pleased, and that nothing in the occupation of a baker in-

dicated any public necessity for such an attempt to deprive employers and employees of the freedom of contract secured to them by the Constitution. The act was denounced in the Supreme Court of the United States as an unreasonable, unnecessary and arbitrary attempt to deprive those engaged in the industry of making bread of their Constitutional rights. This case was largely quoted from and approved as late as April 9, 1923, in the case of Adkins vs. Children's Hospital, 43 S. Ct. 394, and is beyond doubt the leading case limiting the power of states to interfere with the freedom of contract in respect of hours of work.

The act creating the Court of Industrial Relations, if there is any field for its operation, necessarily must affect all persons alike who come within the terms of the statute. The expressions to be found in the opinion of the Industrial Court giving the reasons for making the order of May 1, 1921, are not found in the statute. Nothing indicates that the Legislature intended to enact a law limiting the hours during which employees in the designated industries should work. The power to make orders fixing hours of labor and wages conferred upon the Industrial Court was not so conferred with a view to the preservation of the health of the employees, but with a view to satisfy such employees and bring about a settlement of controversies between them and their employers. In other words, the power to fix wages and hours and conditions of labor was a mere incident to the power conferred to settle such controversies. Nothing in the statute indicates a legislative purpose to confer upon the Industrial Court the power to determine whether the health of the employees in the designated industries demanded long or short hours. Indeed, until and unless a complaint was filed showing the

existence of a controversy threatening the continuity of operation of the essential industry the Industrial Court was granted no power whatever. In case of such controversy it was given the power to settle it and as an incident to such power, was authorized to fix hours and conditions of labor and minimum wages. Unless this court adheres to the view which the Supreme Court of the United States declined to adopt, that the Legislature had a right to regulate packing houses because they were affected with a public interest, and that such regulation might extend to the compulsory settlement of controversies between workers and employers which threatened the continuity of the operation of the packing houses, there can be no foundation for the present contention made by the Industrial Court that the statute here in question is within the decision of Bunting against Oregon.

The same arguments here advanced were presented to the Supreme Court and overruled in Lochner vs. New York. The Supreme Court first showed that the general right to make a contract in relation to a citizen's business is part of his liberty protected by the Fourteenth Amendment; that the right "to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right". It then said that there are certain powers reserved to the states "somewhat vaguely termed police powers"; that such powers relate to the safety, health, morals and general welfare of the public; and, that both property and liberty are held on such reasonable conditions as may be imposed by the state in the exercise of such police power. It was further decided that the Fourteenth Amendment was not designed to interfere with the proper exercise of such police powers. The court pointed out that if the

contract be one which a state, in the legal exercise of its police power, might prohibit, it is not prevented from prohibiting such a contract by the Fourteenth Amendment. The argument was illustrated by contracts for the use of property for immoral purposes, or to do any other unlawful acts, and showed that such contracts did not come within the protection of this amendment. The court then went on to say that when a state in the assumed exercise of its police powers enacted a statute which seriously limits the right to labor, or the right to contract in regard to their means of livelihood, between employers and employees, *sui juris*, it is of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring or from entering into a contract to labor beyond a certain time prescribed by the state.

It was pointed out that the Supreme Court had recognized the existence and upheld the exercise of the police powers of the states in cases which might fairly be considered as border cases, and has been guided by rules of a very liberal nature, resulting in numerous instances in upholding the validity of state statutes. Reference was made to Holden vs. Hardy, 169 U. S. 366, where the court had under consideration an act of the State of Utah, limiting the employment of workmen in all underground mines to 8 hours per day, except in cases of emergency; and, also limiting the hours of labor in smelters and other institutions for the reduction and refining of ores to 8 hours a day, except in like cases of emergency. This act was held to be valid exercise of the police powers of the State because the kind of employment, mining, smelting, etc., and the character of the employees engaged in that

kind of labor, were such as to make it reasonable and proper for the state to interfere to prevent the employees from being constrained by the rules laid down by the proprietors in regard to labor.

It was shown that in every case that comes before the Supreme Court the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? It was added: (p. 56) "Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase and the other to sell labor".

Referring to the New York statute which read:

> "No employee shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work."

the court said:

> "The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, inter-

> fering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground."

The defendant asks that it be observed at this point that the act creating the Court of Industrial Relations does not purport to have been enacted in the interest of the employer or of the employee. In the public statements of those who were concerned in the drafting of the statute, as well as in the opinions of this court expressed in its numerous decisions, it has been said that the statute was enacted to protect the third party to labor controversies—the public. The whole design of the statute shows that this was its purpose. It necessarily follows therefore that unless the public is affected or may be affected, as distinguished from the employer and employee, there is no field for the operation of the act. Clean and wholesome meat sold to the public does not depend upon whether the packing house employee works 8 hours or 10 hours. The limitation, therefore, of the hours of labor, expressed in the order of the Industrial Court, cannot come within the police powers on the ground of public welfare. In this respect the statute differs radically from hours of labor statutes enacted in respect of those who are en-

gaged in operating railroads, where the welfare of the public depends upon the physical condition of the engineer who operates the locomotive and the trainmen intrusted with the safety of the public and its property.

If this were a statute like the Oregon statute enacted in the interest of employees and directed to the preservation of their health, other considerations would arise. It is not such a statute. There is not a word in the act indicating any other purpose than the compulsory settlement of controversies which might affect the public's supply of necessaries of life. Unless it can be shown that the public supply of meat is dependent upon the hours of labor of those engaged in preparing the meat for human consumption, the whole argument fails.

In the opinion of counsel for the defendant if this question were open and had not already been decided in the decision of the Supreme Court of the United States entered in this cause on June 11, 1923, it is believed that the decision of Lochner vs. New York is controlling, and that this court should have held and decided in the first place that as this statute was not enacted for the preservation of the health of the employers or employees, therefore it must be sustained, if at all, upon the public nature of the business over which the legislature attempted to exercise control through the Industrial Court.

Penalty Argument:

In Bunting against Oregon it was said that the view of the Oregon Supreme Court to the effect that the requirement of time and one-half for overtime was in the nature of a mild penalty for employing one more than the statutory hours, and that this penalty went to the employee in case the employer availed himself of the over-

time provision. In the State Supreme Court it was said: (Page No. 4 of plaintiff's petition for rehearing).

> "Legislative provisions are frequently made and a portion of a fine for the infraction of a statute shall be paid to the informer."

In the Supreme Court of the United States it was said that the provision for time and one-half for overtime was a penalty to be paid to the employee. In this State the legislature is powerless to enact such a statute. In this case it has not enacted such a statute. The act itself provides penalty for its infringement. In Section eighteen will be found the penalty for a violation of a valid order made by the Industrial Court. This Section provides for fine and imprisonment. It must be clear that the Industrial Court has no power to impose an additional penalty. Furthermore, Section 6 of Article 6 of the State Constitution provides that proceeds of fines shall go to the counties in which the money is paid or fines collected to the support of the common schools. This section was considered by this court in A. T. & S. F. Ry. Company vs. State, 22 Kans. 14. The legislature, by statute, required that locomotives should have a bell which should be rung at a distance of 80 rods from crossings. One of the sections of the act provided for a penalty of $20.00 for every neglect to ring the bell, as provided by the statute, and that one-half of such penalty should go to the informer. The opinion of this court was delivered by Mr. Justice Valentime, who pointed out that the words "penal laws" as used in the constitution meant laws for the breach of which a penalty was imposed, and that if this penalty was imposed "merely as punishment" the penalty is a fine. He added: (p. 25)

> "The legislature may give damages wherever loss has been sustained. It may give enhanced damages, double damages, treble damages, exemplary damages, and remote as well as proximate damages, but these are all damages because of loss sustained and not merely punishment for some breach of the penal laws. . . . In all cases where money is imposed merely as punishment for the violation of some law, we think the imposition of such money should be called a fine."

According to the contention of counsel in this case, the imposition of time and one-half for double time is not intended as wages, nor a regulation of wages, but is intended as a penalty imposed upon the employer for failing to comply with the provisions of the law as announced by the Industrial Court, and that it is proper that this penalty should go to the employee.

The question again arose in Harrod vs. Latham, 77 Kans. 466, where it was held that the provision in the Insurance laws that one-half of the penalty should go to the informer was obnoxious to the constitutional provision and that as this provision was invalid the fund arising from the breach of the statute would be disposed of as the Constitution directs. That is, that the penalty imposed for violating the law should go to the county for the benefit of the school fund. It necessarily follows that if this provision for time and one-half for overtime is a penalty, the payment of such penalty to the employee is prohibited by the Constitution.

The Jurisdiction of This Court is Limited, in Any Event, to a Reversal of Its Original Judgment in This Cause, and It Has No Authority to Modify Such Judgment.

Counsel for the defendant most respectfully refers to the argument in support of its motion to spread the man-

In the Supreme Court of the United States.

OCTOBER TERM, 1924.

CHAS. WOLFF PACKING COMPANY, *Plaintiff in Error*,
vs.
COURT OF INDUSTRIAL RELATIONS OF THE STATE OF KANSAS, *Defendant in Error*.

No. 207 (29,282).

CHAS. WOLFF PACKING COMPANY, *Plaintiff in Error*,
vs.
COURT OF INDUSTRIAL RELATIONS OF THE STATE OF KANSAS, *Defendant in Error*.

No. 299 (29,143).

In Error from the Supreme Court of the State of Kansas.

BRIEF OF DEFENDANT IN ERROR.

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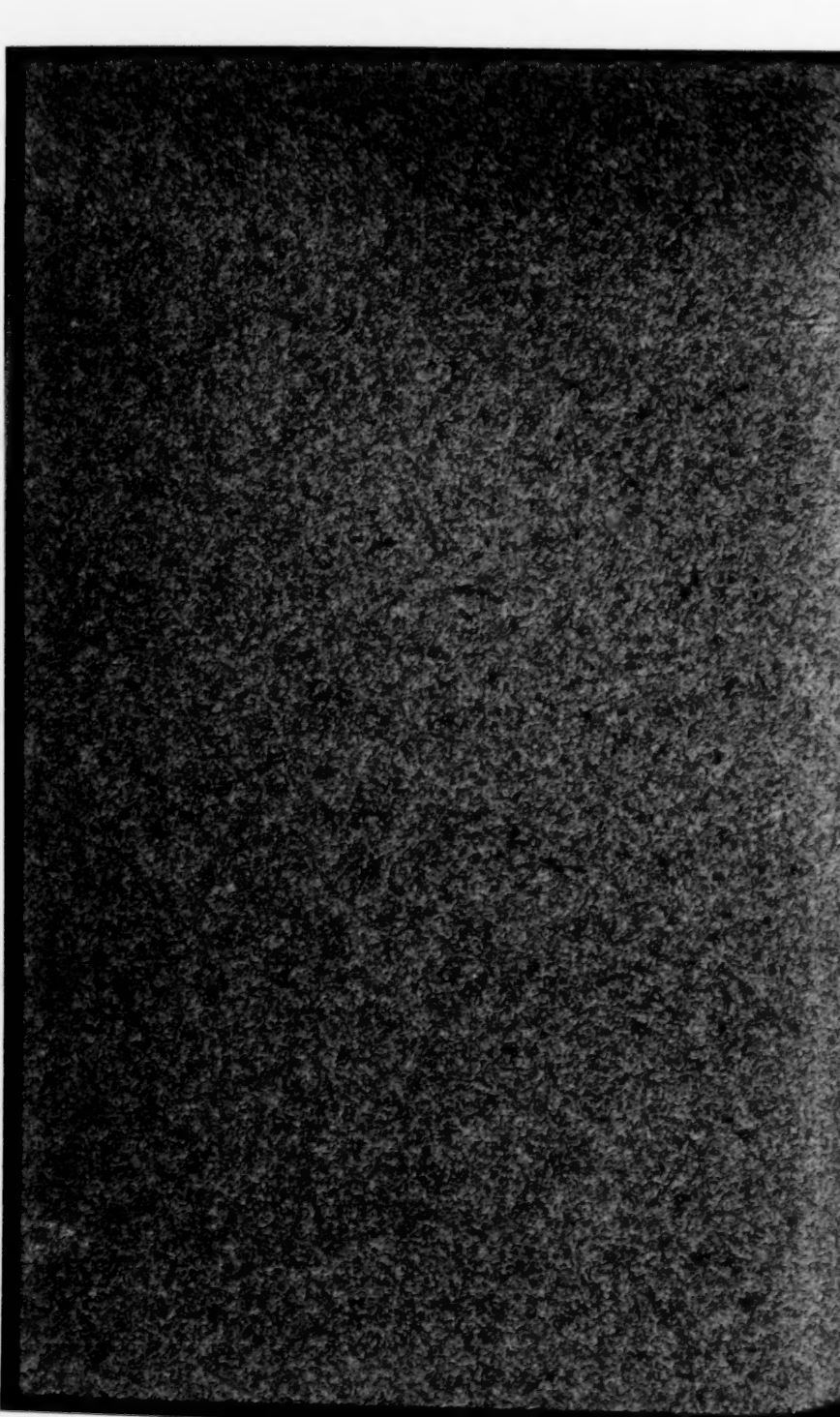

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In the Supreme Court of the United States.

OCTOBER TERM, 1924.

CHAS. WOLFF PACKING COMPANY, *Plaintiff in Error,*
vs.
COURT OF INDUSTRIAL RELATIONS OF THE STATE OF KANSAS, *Defendant in Error.*

No. 207 (29,932).

CHAS. WOLFF PACKING COMPANY, *Plaintiff in Error,*
vs.
COURT OF INDUSTRIAL RELATIONS OF THE STATE OF KANSAS, *Defendant in Error.*

No. 299 (30,149).

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

These cases involve the validity of the order of the Court of Industrial Relations of the state of Kansas fixing hours of labor in plaintiff in error's packing plant. The order in question is a portion of the same order which was before this Court in *Packing Company v. Court of Industrial Relations*, 262 U. S. 522, decided June 11, 1923, in which the decision of the Supreme Court of Kansas, enforcing the order as a whole (109 Kan. 629, 111 Kan. 501), was reversed, on the ground that the Kansas Industrial Court law was invalid in so far as it attempted to regulate wages. Further proceed-

ings were had in the Supreme Court of Kansas (*Court of Industrial Relations v. Wolff Packing Co.*, 114 Kan. 304, 487), upon motions to spread the mandate and modify the judgment, and from those two decisions these writs of error are taken.

The Supreme Court of Kansas, after reversal of its previous decisions by this court, and upon motion of the Court of Industrial Relations, held that this court had reversed only that part of the prior judgment of the Supreme Court of Kansas relating to wages, and that paragraphs III, XIV and XIX of the original order of the Court of Industrial Relations related to hours of labor only and constituted a valid exercise of the police power and should be put into effect, notwithstanding the invalidity of those portions of the Industrial Court Act and the order in question relating to the fixing of wages. The decisions of the Supreme Court of Kansas now in question are found on pages 8 to 12 of the transcript in case No. 207 and pages 9 to 14 of the transcript in case No. 299.

There are two writs of error and two transcripts of these proceedings, because a writ of error was secured by plaintiff in error prior to the granting of a rehearing by the Kansas Supreme Court, and another writ of error was secured after the decision on rehearing. The final decision of the Supreme Court of Kansas is in case No. 299 (pages 9 to 14).

History of the Case.

The facts leading to the institution of this suit appear fully in the record in case No. 739, October term, 1922 (decided 262 U. S. 522), and for the purpose of these cases we summarize them briefly.

The Chas. Wolff Packing Company, located at Topeka, is one of the smaller packing companies operating in the state of Kansas, having annual sales of about $7,000,000 and employing about 300 workers. (R. 56, 57.) In 1921 its workers were members of the same meat-cutters' union as were the employees in all the large

packing houses in the country. (R. 99.) As to industrial disputes, the packing industry had been since 1918 operating under a system of arbitration, with Federal Judge Alschuler as administrator, and in 1918 he had ordered the eight-hour day into effect in all of the large packing houses in the country. (R. 190.) The Wolff Packing Company, while not directly bound by the decisions of Judge Alschuler, had followed the lead of the other companies and installed the eight-hour day in its plant in June, 1920, under an agreement with its employees of May 10, 1920. (R. 7, 8.)

Early in 1921 all of the packing companies showed a desire to break away from the awards of Judge Alschuler and to lower wages and lengthen the day. (R. 99, 100.) Their program was vigorously opposed by the union, and strikes were called all over the country in opposition thereto. (R. 100.) Prompt action of cabinet officers led to an agreement that Judge Alschuler should continue as administrator until September 15, 1921, which he did. (R. 100.) Then his administration came to an end and a disastrous strike of packing-house employees all over the country took place.

In the meantime, while this dispute was most intense, on January 17, 1921, the Wolff Packing Company refused to enter into a new agreement with its employees on the basis of the agreement of the year before and posted a new schedule of wages and hours, reducing the wages and abolishing the eight-hour day. (R. 185.) The local union voted to strike, but upon reconsideration decided to present the matter to the Kansas Court of Industrial Relations. (R. 103.)

The Court of Industrial Relations took jurisdiction of the controversy, and after extensive hearings issued its order fixing wages, hours and working conditions. (R. 21-23.) The portions of the order relating to working conditions were declared invalid by the Supreme Court of Kansas, due to lack of proper notice to the re-

spondents, and the portions dealing with wages have been found invalid by this court in 262 U. S. 522.

At the hearing the evidence showed the following working and hour conditions:

Working and Hour Conditions.

(The references under this subheading are to the record in the former case in this court, No. 739, October term, 1922.)

The temperature of the rooms in which some employees had to work varied from 30 degrees to 120 degrees. (R. 194, 196.) Some worked in damp places where they had to wear rubber boots. (R. 194, 195, 196.) Women workers who went from the trimming room to the head room passed from a temperature of 48 degrees to one of 110 degrees. Such changes caused them to have rheumatism. (R. 106, 196.) Twenty-five per cent of the men employees went from low-temperature to high-temperature rooms, where the variation was from 30 to 32 degrees to 125 or 130 degrees. This gave them rheumatism. (R. 196, 197.) Because of the wet floors and the dampness many of the employees had to wear waterproof clothing. (R. 99.) The atmosphere was in general disagreeable, the dressing rooms dirty, and with no ventilation to speak of. (R. 110, 113.) The Industrial Court, in its temporary findings and order of March 1, 1921, found that the working conditions in the Wolff Packing Company's plant were disagreeable, the work strenuous, and, when long continued, detrimental to health. (R. 11.)

Beginning January 17, 1921, the eight-hour day, which had been in effect from June 1, 1920, under the agreement of May 10, 1920, was taken away from the employees of the packing company, and thereafter they often worked ten or twelve hours. (R. 184, 185.)

The Alschuler eight-hour day, which affected most of the packing industry throughout the United States, went into effect May 5,

1918. Before that time there had been no eight-hour day in the packing industry, but the work had been for ten, eleven and twelve hours a day. (R. 190.) The dispute between the Wolff Packing Company was in part concerning the eight-hour day. (R. 100, 101.)

Various employees testified that after January 17, 1921, they had to work from nine, ten to eleven and twelve hours, some of them seven days a week. (R. 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 184, 185, 190, 191, 192, 193, 194, 195, 196.) And some of the employees had to work from ten to thirteen hours a day. (R. 111, 112, 113.)

In the discussion on the question of the eight-hour day and time and a half for overtime, counsel for the packing company stated: "I think no intelligent man in this country would say a man ought to work more than eight hours. He has probably reached his maximum." (R. 193.) The testimony showed that the employees had been driven and speeded at their work. (R. 103, 104, 110, 126, 187, 188, 191.) The workmen at the plant changed their street clothes to their working clothes in the morning and back again in the evening. They did their washing and cleaning up on their own time. (R. 99.) This process of changing clothes, washing and cleaning required from thirty to sixty minutes per day. (R. 12, 17.)

On the question of hours, the Court of Industrial Relations stated the reasons for its order as follows:

"One of the principal contentions in the evidence is the question of the eight-hour basic day. Upon this point the evidence shows that many workers, especially those engaged in what is called the killing, cutting and trimming departments, are in the very nature of the business compelled to work under conditions which are disagreeable and are not conducive to the health of the workers. Some of these workers are standing over scalding vats in rooms that are more or less filled with steam from the hot water; others are working under conditions which require them to wear rubber boots and

rubber clothing to protect themselves from blood, water and steam; others are handling the entrails and the different parts of the carcasses of the slaughtered animals and using water in the cleansing process. While the evidence shows to the entire satisfaction of the court that the work in this plant is done under the best possible conditions of cleanliness, nevertheless there is about the work that which not only requires strenuous physical exertion, but is also disagreeable and more or less unhealthful in other respects." (R. 16.)

The above finding is amply supported by the evidence as shown in the record in this court in case No. 739, October term, 1922 (pages 11, 16, 99, 106, 110, 113, 191, 195, 196).

The Ability of the Packing Company to Mitigate the Hours.

(The references under this subheading are to record in case No. 739, October term, 1922.)

From June 1, 1920, until January 17, 1921, the packing company had operated under the eight-hour day. Most packing plants of the country operated under the eight-hour day from May 5, 1918, until September 15, 1921.

The testimony of Charles Wolff, Jr., president of the packing company, was to the effect that the company could partly but not entirely control live-stock receipts. His testimony did not disclose any systematic or energetic effort of the packing company to control the live-stock receipts. (R. 59, 215.)

Mr. C. W. Sheehan, the production superintendent of the packing company, testified that outside of the killing gang, if it was not in the season when the work was heaviest, there would be no disadvantage in the eight-hour day. They had regular hog pens and cattle pens to hold the live stock as it came in. They did not have to kill them the next day after they arrived, but were subject to loss in the way of shrinkage or disease. The plant was prepared to feed them for a day or two. Within certain limits they could control the quantity of killing from day to day. Cattle will not eat or drink under changed conditions, but hogs will fatten in the stockyards. (R. 214.)

By far the larger part of the packing company's business was in packing hogs. It purchased about 125,000 hogs a year and 7,500 cattle. (R. 59, 73, 183, 184.) The plant had a weekly capacity of about 4,500 hogs and 300 cattle (R. 54, 55); the average weekly killing was about 200 cattle and from 3,000 to 4,500 hogs. (R. 197.)

It is plain from this, the principal business being the slaughtering of hogs, that the killing of the same could be controlled. (R. 214.)

The order of the Court of Industrial Relations, in so far as it relates to hours of labor, is as follows:

"3. A basic working day of eight hours shall be observed in this industry but a nine-hour day may be observed not to exceed two days in any one week without penalty: *Provided, however*, That if the working hours of the week shall exceed forty-eight in number, all over forty-eight shall be paid for at the rate of time and one-half; furthermore, in case a day in excess of the eight-hour day shall be observed more than two days in any one week, all over eight hours, except for said two days in said week, shall be paid for at the rate of time and one-half, even though the working hours of the week may be forty-eight hours or fewer."

"14. Workers paid by the week or day, if employed within the plant and not within the office or sales department, shall be subject to hours of work and overtime as other employees under the terms of finding No. 3 hereof."

"19. In departments operating twenty-four hours a day and seven days a week, each employee therein shall be entitled to one day off each week. In other departments work performed on Sunday and legal holidays shall be paid for at the rate of time and one-half.

(Fol. 22.) "This order shall . . . continue in force until changed by the court [the Court of Industrial Relations] or changed by agreement of the parties with the approval of the court [the Court of Industrial Relations]." (R., Case 299, 14.)

The above-quoted portions of this order are those which the Supreme Court of Kansas has found to be valid, notwithstanding the invalidity of the wage provisions and ordered them put into effect by the plaintiff in error. (114 Kan. 487.)

ARGUMENT.

I.

The Supreme Court of Kansas Had Authority to Grant a Rehearing and Modify Its Judgment Within the Time Provided by Its Rules for Rehearings, Although a Writ of Error Had Been Allowed.

In the lower court plaintiff in error objected to a further consideration of this case after a writ of error had been granted in case No. 207, although the Court of Industrial Relations filed a petition for rehearing within the time provided by the rules of the Kansas Supreme Court, which rehearing was granted and the decision changed, as appears in case No. 299.

Plaintiff in error now advises the court that it makes no objection to this procedure in order to expedite the determination of these cases; but since this was an attack upon the jurisdiction of the lower court, we briefly refer to authorities for the action taken.

In any event, the Supreme Court of Kansas had authority to grant a rehearing and modify its judgment within the time provided by its rules for the filing of a petition for rehearing, although a writ of error had been allowed.

Ex parte Fuller, 182 U. S. 562; 21 S. Ct. Rep. 871; 45 L. Ed. 1230.

C. & N. W. Ry. Co. v. McKinley, 99 U. S. 147; 25 L. Ed. 872.

Brockett v. Brockett, 43 U. S. 238, 239; 11 L. Ed. 251.

City of Memphis v. Brown, 94 U. S. 715; 24 L. Ed. 244.

Northern Pacific Railway Company v. Holmes, 155 U. S. 138; 39 L. Ed. 99.

The Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31; 37 L. Ed. 986.

Kingman and Company v. Western Manufacturing Company, 170 U. S. 675; 42 L. Ed. 1192, 1194.

Bierce v. Waterhouse, 219 U. S. 320, 337; 55 L. Ed. 237, 243.
Alexander v. U. S., 57 Fed. 828 (C. C. A., 9th circuit, 1893).
Altenberg v. Grant, 83 Fed. 980 (C. C. A., 6th Circuit 1897).
Wagner v. Meccano, 235 Fed. 890; 199 C. C. A. 202.
James McCreery Realty Company v. Equitable National Bank of New York, 104 N. Y. Supp. 959, 965, 966, 968; 107 N. Y. Supp. 1081.

II.

The Kansas Supreme Court Had Authority to Modify Its Judgment and Issue a Writ of Mandamus Commanding the Packing Company to Put into Effect the Parts of the Order Not Reversed.

A.

After reversal and direction to take further proceedings not inconsistent with the opinion of the Supreme Court of the United States, a state court has authority to determine questions not decided by the higher court and to modify its judgment accordingly.

The pertinent part of the mandate of this court is as follows:

"On consideration whereof, It is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed, with costs; and that the said defendant, the Chas. Wolff Packing Company, recover against the said plaintiff seven hundred and eighty-three dollars and five cents for its costs herein expended and have execution therefor.

"And it is further ordered that this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this court."

The authorities uniformly hold that a judgment of reversal is not an adjudication of any question other than the one actually discussed and decided.

In *Mutual Life Insurance Company v. Illinois*, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788, being a second appeal from further pro-

ceedings taken by the lower court after reversal of its original judgment sustaining a demurrer, this court said:

"When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded—even though all are not specifically referred to in the opinion—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case. Here, after one judgment on the pleadings had been set aside, on amended pleadings a trial was had, quite a volume of testimony presented, and a second judgment entered. That judgment is now before us for review, and all questions which appear upon the record and have not already been decided are open for consideration." (l. c. 533.)

In *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed. 430, petitions for mandamus were granted to compel the entry of decrees in conformity with the mandate in *Good v. Gaines*, 145 U. S. 141, 12 Sup. Ct. 839, 36 L. Ed. 654, the Supreme Court having previously reversed the case on a question of accounting only, holding that there was an error in the decision of the Circuit Court with reference to plaintiff's right of possession of the land; but the Circuit Court upon the mandate had refused to allow plaintiff possession of the land. The Supreme Court granted a writ of mandamus to compel the lower court to give plaintiff possession of the

land, notwithstanding the judgment of reversal, Mr. Justice Blatchford stating in the opinion:

"Because this court was dissatisfied with the decrees in respect of the accounting, and only for that reason, it reversed the decrees; but it remanded the causes to the Circuit Court with a direction, as the opinion and the mandate explicitly state, for further proceedings to be had therein in conformity with the opinion of this court. It did not disturb the findings and decrees of the Circuit Court in regard to the title and possession, but only its disposition of the matter of accounting. The mandate and the opinion, taken together, although they used the word 'reversed,' amount to a reversal only in respect of the accounting, and to an affirmance of it in all other respects." (*l. c.* 237.)

An important case on this proposition is *In re Sanford Fork & Tool Company*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414, in which the broad and general rule here applicable is laid down by Mr. Justice Gray, as follows:

"But the Circuit Court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. (*Hinckley v. Morton*, 103 U. S. 764; *Mason v. Mining Co.*, 153 U. S. 361, 14 Sup. Ct. 847; *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 5 U. S. App. 97, 2 C. C. A. 542, and 51 Fed. 929.) The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate, and either upon an application for a writ of mandamus or upon a new appeal it is for this court to construe its own mandate, and to act accordingly. (*Sibald v. U. S.*, 12 Pet. 488, 493; *West v. Brashear*, 14 Pet. 51; *Supervisors v. Kennicott*, 94 U. S. 498; *Gaines v. Rugg*, 148 U. S. 228, 238, 244, 13 Sup. Ct. 611.)" (*l. c.* 256.)

This rule was reiterated by this court in *Ex Parte Union Steamboat Co.*, 178 U. S. 317, 20 Sup. Ct. 940-905, 44 L. Ed. 1084, where the Mr. Justice Brown, delivering the opinion, says:

"The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new

appeal to the proper court (*Re Sanford Fork & Tool Co.*, 160 U. S. 247, 256, 40 L. Ed. 414, 416, 16 Sup. Ct. Rep. 291); and the opinion of this court may be consulted to ascertain exactly what was decided and settled." (*l. c.* 319.)

To the same effect, see *Erie Ry. Co. v. Western Trans. Company*, 204 U. S. 220, 27 S. Ct. 246, 51 L. Ed. 450.

It will be noted in the last case that there were no amended bills or new evidence introduced in the lower court, and the further proceedings consisted merely of entering a decree upon the proceedings already had.

See also: *In Re Potts*, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994; *Murphy v. Utler*, 186 U. S. 99, 46 L. Ed. 1074, 22 Sup. Ct. 777; *Southern Building Etc. Co. v. Carey* (W. D. Tenn.), 117 Fed. 325; *Great Northern Railway Co. v. Western Union Telegraph Co.*, 174 Fed. 321 (8 C. C. A.); *Taenzer v. Railway Co.* (6 C. C. A.), 191 Fed. 543; *General Inv. Co. v. Ry. Co.*, 6 C. C. A., 269 Fed. 235-240.

The application of the rule to the case at bar is exemplified by the recent case of *Hallanan v. Eureka Pipe Line Co.*, 261 U. S. 393, 43 Sup. Ct. 414-416, 67 L. Ed. 715. In that case the pipe-line company had filed a bill of injunction against certain state officials to restrain the collection of a tax on oil being transported by it. The Supreme Court of Appeals of West Virginia held that oil originating in West Virginia carried out of the state to a destination undetermined was in intrastate commerce and was a proper subject for state control. This court reversed that rule, holding this to be interstate commerce, to which the tax would not apply, and remanded the case for further proceedings not inconsistent with the opinion. The Supreme Court of West Virginia then held the whole act invalid because of the invalidity of that part relating to interstate commerce. It was contended that this holding was inconsistent with the mandate, but Mr. Chief Justice Taft, in delivering

the second opinion, approved the action of the lower court in the following language:

"This court gave no consideration to the question whether the invalidity of part of the tax rendered the whole law void because indivisible, as the Circuit Court had held it to be. That was peculiarly a state question, and when we reversed the case for the reason that oil in transport which the Supreme Court of Appeals held to be intrastate, and so taxable, was interstate and immune, and remanded the case for further proceedings, it was entirely within the power and duty of that court to decide what under the state law would be the effect of the invalidity of part of the tax levied by the law as adjudged by this court upon the validity of the whole tax law." (*l. c.* 397.)

The similarity of the above case and the case at bar is apparent. In the Hallanan case this court decided that the tax was invalid as applied to interstate oil, but left to the state court to decide whether the tax on intrastate oil was likewise invalid, in view of the invalidity of the tax on interstate oil. The state court's decision on the latter subject was accepted. In the case at bar this court has held invalid the wage-fixing provisions of the Industrial Court law, leaving to the state court to decide whether the hours of labor provisions fall with the wage-fixing provisions. The State Supreme Court has decided that such regulation of hours of labor is valid, and that decision must be affirmed unless otherwise unconstitutional.

In the cases cited above and quoted from, no distinction is made in cases where further evidence was introduced and the pleadings amended in the lower court and those where no further proceedings were had except the entering of a decree pursuant to the mandate. In *Ex Parte Union Steamboat Co.*, supra, nothing was done except to enter a decree, which decided a question not decided by this court in addition to carrying out the judgment of this court. In *Great Northern Railway Co. v. Western Union Telegraph Co.*, supra, there were no further proceedings except the entry of a decree, and this is

also true in *Southern Building, Etc. Co. v. Carey,* supra. Likewise, in *Hallanan v. Eureka Pipe Line Company,* supra, the Supreme Court of Appeals of West Virginia did not permit further pleadings or take further evidence, but simply affirmed the judgment of the lower court, deciding the question which had not been decided by this court, that the act as a whole was invalid.

Furthermore, in the general statements of the rule in the cases above quoted there is no suggestion that further pleadings and evidence are necessary to give the lower court jurisdiction to decide questions not decided by the higher court. Thus in *In re Sanford Fork & Tool Company,* supra, where further proceedings were actually had, this court did not make its judgment dependent upon such further proceedings, but simply said, "But the Circuit Court may consider and decide any matters left open by the mandate of this court."

B.

The question of the validity of the statute and order relating to hours of labor was not determined by this court in the former appeal.

We respectfully submit that the opinion delivered by Mr. Chief Justice Taft in this case upon the former appeal (262 U. S. 522) did not decide the validity or invalidity of the Kansas Industrial Court Act or the order made under it, so far as the same relates to hours of labor, but left that question for the determination of the state court.

We quote from the opinion of Mr. Chief Justice Taft (262 U. S. 522):

"It has never been supposed since the adoption of the constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation." (*l. c.* 537.)

The above refers to the question of public interest as pertaining to the price of the product or the wages, but not to other phases of public interest.

"In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above, where fear of monopoly prompted, and was held to justify, regulation of rates." (*l. c.* 538.)

Distinction is thus drawn between the regulation of prices and wages and of regulations concerning health.

"All business is subject to some kinds of public regulation, but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction. We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi-public businesses, noted above, because even so, the valid regulation to which it might be subjected, as such, could not include what this act attempts." (*l. c.* 538, 539.)

This court was addressing itself simply to the question of regulation of wages in this industry, and nothing else.

"To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business.

The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation." (*l. c.* 539.)

. . . . . .

"The employer is bound by this act to pay the wages fixed, and while the worker is not required to work at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against them, and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him.

"There is no authority of this court to sustain such exercise of power in respect to those kinds of business affected with a public interest by a change *in pais*, first fully recognized by this court in *Munn v. Illinois*." (*l. c.* 540.)

. . . . . .

"We are considering the validity of the act as compelling the employer *to pay the adjudged wages*, and as forbidding the employees to combine against working and receiving them. The penalties of the act are directed against effort of either side to interfere with the settlement by arbitration. Without this joint compulsion, the whole theory and purpose of the act would fail. The state cannot be heard to say, therefore, that upon complaint of the employer, the effect upon the employee should not be a factor in our judgment." (*l. c.* 541.)

In the above paragraph the court was still speaking of wages, and its language in the last part had reference to wages. The last paragraph of the opinion is as follows:

"We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the fourteenth amendment and deprives it of its property and liberty of contract without due process of law." (*l. c.* 544.)

The opinion said nothing against the judgment of the state court on the hours-of-labor part of the order. The result is plain. Only the portion of the judgment of the state court concerning wages was reversed. The remainder was not reversed and should still stand

and be enforced. This court properly left to the state court the question of the enforcement of the statute as to packing plants with the authority to fix wages eliminated.

The state court by its familiarity with the history of the situation in the state was prepared to give a construction to the statute which would carry out the legislative intent.

In the case of *Dorchy v. Kansas*, 264 U. S. 286, this court, in considering another phase of the Industrial Court law, did exactly what it has done with relation to hours of labor in this case. This court found that the Dorchy case had been affirmed by the Supreme Court of Kansas before the wage-fixing portions of the statute were declared invalid, and considered it proper that the Supreme Court of Kansas should decide whether this affected the remainder of the act. In the Dorchy case reference is made to the first appeal in this case as follows:

"The Supreme Court of Kansas has already dealt, to some extent, with the effect of our decision upon other sections of the act. When a motion was made there in the Wolff Packing Co. case to spread the mandate of this court upon its record, the state court held that the order of the Court of Industrial Relations under review remains in force in so far as it regulates hours of labor and weekly rest periods. (114 Kan. 304.) The judgment then entered was modified November 10, 1923, upon a rehearing. (114 Kan. 487.) The relation of section 19 to the provisions held invalid is a different matter. So far as appears, the state court has not passed upon the question whether section 19, being an intimate part of the system of compulsory arbitration held to be invalid, falls with it. In order that the state court may pass upon this question its judgment in this case, which was rendered before our decision in the Wolff Packing Co. case, should be vacated. Compare *Gulf, Colorado & Santa Fe Ry. Co. v. Dennis*, supra, p. 509." (*l. c.* 291.)

The wisdom of the action of this court in not referring to hours of labor in the decision of the first appeal is manifest. The provisions of the statute relating to hours, although otherwise valid, might have been found so dependent upon the fixing of wages that

the whole statute was invalid, and it was the duty of the Supreme Court of Kansas to determine that question. If the whole statute depended upon the wage-fixing provisions, and was therefore invalid, there was no occasion for any court to determine the validity of the provisions concerning hours of labor separately. The Supreme Court of Kansas has found that the hours-of-labor provisions stand by themselves without reference to the wage provisions, and there is now presented the question of whether a state may lawfully fix hours of labor in industries where long hours of work are injurious to the health of the worker.

III.

The Kansas Industrial Court Law, in so far as it Authorizes Fixing Hours of Labor in Plaintiff in Error's Packing Plant and Penalizes Overtime, is Valid.

A.

The Act takes into consideration the health of the workers.

The interpretation of the statute in this case by the Supreme Court of Kansas is binding upon this court. (*Farncomb v. Denver*, 252 U. S. 7, 64 L. Ed. 424.) The Supreme Court of Kansas has decided that the protection of the health of the workers is a part of the purpose of the law. In the first opinion rendered by that court in this case (109 Kan. 629) it said:

"The successful operation of the four classes of business named, one of which includes packing houses, is necessary for the peace, comfort and welfare, and particularly the health, of the people. These industries are subject to interruption on account of conditions now existing. Those engaged in these industries constantly work in the presence of danger. Long hours of continuous employment will render them less able to avoid those dangers because of the weariness that overtakes anyone who for a long period of time continuously works at any one thing. Constant employment at the same task for long hours day after day will render the worker both

physically and mentally less able to perform his labor. Protection to the workman in these industries demands that his daily hours of labor be not so extended as to prematurely exhaust his powers." (*l. c.* 646-647.)

The above quotation shows that the Supreme Court of Kansas, from the start of this litigation, has interpreted the statute as having among its purposes the protection of the health of the workers, and has recognized the fixing of hours of labor as a method of protecting their health.

B.

The Jurisdiction of the Court of Industrial Relations on the Subject.

The Supreme Court of Kansas has construed the statute in question to empower the Court of Industrial Relations to take jurisdiction of this controversy between the Wolff Packing Company and its employees over hours of labor. This jurisdiction can be sustained though the provision of the statute declaring the packing industry to be affected with a public interest be ignored. It is the rule that the construction by a state supreme court of a state statute will be followed by this court. If it were a matter of discussion whether the construction of this statute be correct, the reasons in support of it are plain.

The opinion of this court when this case was here before did not say that the business of meat packing might not to any extent be affected with a public interest.

Section 28 of the Industrial Court Act is as follows:

"SEC. 28. If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court."

If the provisions as to the industry being affected with a public

interest should be omitted from the act it may still operate beneficially.

Omitting the words "affected with a public interest and therefore" from the first clause of section 3 of the act, that clause reads as follows:

"SEC. 3. (*a*) The operation of the following named and indicated employments, industries, public utilities and common carriers is hereby determined and declared to be . . . subject to supervision by the state as herein provided for the purpose of preserving the public peace, protecting the public health, preventing industrial strife, disorder and waste, and securing regular and orderly conduct of the businesses directly affecting the living conditions of the people of this state and in the promotion of the general welfare, to wit:"

The first part of section 7 of the act is as follows:

"SEC. 7. In case of a controversy arising between employers and workers, or between groups or crafts of workers, engaged in any of said industries, employments, public utilities, or common carriers, if it shall appear to said Court of Industrial Relations that said controversy may endanger the continuity or efficiency of service of any of said industries, employments, public utilities or common carriers, or affect the production or transportation of the necessaries of life affected or produced by said industries or employments, or produce industrial strife, disorder or waste, or endanger the orderly operation of such industries, employments, public utilities or common carriers, and thereby endanger the public peace or threaten the public health, full power, authority and jurisdiction are hereby granted to said Court of Industrial Relations, upon its own initiative, to summon all necessary parties before it and to investigate said controversy."

After these provisions above quoted, in section 7 there is a clause authorizing the Court of Industrial Relations to take jurisdiction of such a controversy on various complaints, including that made by either party to the controversy.

By the last sentence of section 7 the Court of Industrial Relations may make findings upon the subject and by section 8, it may "order such changes, if any, as are necessary to be made in and about the conduct of said industry, employment, utility or common carrier,

in the matters of working and living conditions, hours of labor, rules and practices, . . . to conform to the findings of the court in such matters, as provided in this act."

The opinion of this court in this case when here before does not intimate that the legislature may not to some extent remove obstacles to the continued or efficient operation or service of the meat-packing industry.

That the state may to some extent at least remove such obstacles is plain from the establishment by states and by the national government of boards of mediation, conciliation or arbitration to settle disputes between employers and employees. In addition to taking jurisdiction of a controversy which may endanger the continuity or efficiency of service of the meat-packing industry, the Court of Industrial Relations may, under section 7 of the act, take jurisdiction of a controversy that may "affect the production or transportation of the necessaries of life affected or produced by said industries or employments, or produce industrial strife, disorder or waste, or endanger the orderly operation of such industries, employments, public utilities or common carriers, and thereby endanger the public peace or threaten the public health."

For the purpose of this argument, we can pass the question as to the power of the Court of Industrial Relations to take jurisdiction of a controversy which "may endanger the continuity or efficiency of service of any of said industries," and consider the other cases where, under section 7, it may take jurisdiction. To some extent the state may intervene to keep open a market to its producers of live stock, to protect the supply of meat food, to prevent the obstruction, crippling or breaking down of the meat-packing industry and the interruption or the loss of employment of the workers therein. An injury to the employer in the industry or to the employees is an injury to the public welfare. The interruption or loss of employment

of the workers means a deprivation to them and their families and a blow to the prosperity of the community in which they live. Unsettled labor disputes have unfortunately often been accompanied by breaches of the peace, assaults, injury to persons, riots and injury to or destruction of property, and sometimes murders. A civilization which does not do everything practicable to overcome these evils does not adequately function. It is a matter of public welfare and of important concern to the state whether a market shall be kept open for the live stock produced by its farmers, whether a meat supply shall be furnished to its people, whether an industry shall operate without interruption or breakdown, and whether laborers shall have employment and their families be maintained, whether property shall be protected from mischievous damage, and whether the peace of the community shall be maintained and people shall be guarded against physical injuries and loss of life.

To some extent and by some means the state may properly protect the public welfare on these subjects and guard against these evils. To what extent and how it may do so is another phase of the discussion. Where the removal of the cause of any of these injuries is, taken by itself, within the scope of governmental power, then it may be removed. Where excessive hours of labor injurious to the health of the workers constitutes one of the causes of the controversy, then that evil may be remedied and as a result the injurious consequences which flow from it avoided. To put the matter in another way, injurious consequences can be prevented, and in order to do so, harmful, excessive hours of labor can be remedied within the scope of the police power of the state. Further trouble can be prevented by removing the cause.

The dispute at this plant concerning hours of labor presented a controversy that affected the production of the necessaries of life produced at the plant, caused industrial strife, disorder and waste,

injured the orderly operation of the plant, and thereby endangered the public peace and threatened the public health. The facts presented in the controversy come within the provisions of section 7 authorizing the Court of Industrial Relations to take jurisdiction.

The dispute over hours of labor was one of the grounds of the controversy. The court properly took jurisdiction and ordered relief which, if carried out, would remove one of the causes of the controversy and would do away with injuriously long hours of labor. This relief was within the purview of the statute and within the power of the state.

C.

The act is uniform in its operation and there is no denial of the equal protection of the laws.

The statute applies equally to five distinct classes of industries, among which are included all manufacturers of food products, and this classification is reasonable.

The census of 1920 showed that Kansas ranked second among the states in the size of its meat industry and was surpassed only by Illinois. All the Big Five Packers have plants in Kansas. There are a number of independent plants at Kansas City, Kan., Wichita, Coffeyville, Arkansas City, Leavenworth, Topeka and other places, and there were twenty-eight packing plants in all in the state in 1919, employing 17,805 persons. (See pamphlet issued by the Bureau of Census, Department of Commerce, giving figures obtained from the Fourteenth Census of the United States, prepared under the supervision of Eugene F. Hartley, chief statistician for manufacturers, published at Washington, 1922, pages 3, 4, 5, 6, 11, 12, 13, 15, 17, and tables 4, 5, 16, 17, 18, 20 and 24.)

The court has repeatedly held that the legislature possesses wide discretion in classifying the objects affected by the laws enacted,

and that it may adopt any classification which is not wholly arbitrary and unreasonable.

"We have declared so often the wide range of discretion which the legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary and is uniform within the class, it is within such discretion." (*Mutual Loan Co. v. Martell*, 222 U. S. 225, 235.) See, also, *Louisville & Nashville v. Melton*, 218 U. S. 36, 55, and cases cited.

In the case of *Radice v. New York*, 264 U. S. 292, this court discussed the field of reasonable classification as follows:

"Nor is the statute vulnerable to the objection that it constitutes a denial of the equal protection of the laws. The points urged under this head are (*a*) that the act discriminates between cities of the first and second class and other cities and communities; and (*b*) excludes from its operation women employed in restaurants, as singers and performers, attendants in ladies' cloak rooms and parlors, as well as those employed in dining rooms and kitchens of hotels and in lunch rooms or restaurants conducted by employers solely for the benefit of their employees.

"The limitation of the legislative prohibition to cities of the first and second class does not bring about an unreasonable and arbitrary classification. (*Packard v. Benton*, ante, 140; *Hayes v. Missouri*, 120 U. S. 68.) Nor is there substance in the contention that the exclusion of restaurant employees of a special kind, and of hotels and employees' lunch rooms, renders the statute obnoxious to the constitution. The statute does not present a case where some persons of a class are selected for special restraint from which others of the same class are left free (*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 564); but a case where all in the same class of work are included in the restraint. Of course, the mere fact of classification is not enough to put a statute beyond the reach of the equality provision of the fourteenth amendment. Such classification must not be 'purely arbitrary, oppressive or capricious.' (*American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 92.) But the mere production of inequality is not enough. Every selection of persons for regulation so results, in some degree. The inequality produced, in order to encounter the challenge of the constitution, must be 'actually and

palpably unreasonable and arbitrary.' (*Arkansas Natural Gas Co. v. Railroad Commission*, 261 U. S. 379, 384, and cases cited.) Thus classifications have been sustained which are based upon differences between fire insurance and other kinds of insurance (*Orient Insurance Co. v. Daggs*, 172 U. S. 557, 562); between railroads and other corporations (*Tullis v. Lake Erie & Western R. R. Co.*, 175 U. S. 348, 351); between barber-shop employment and other kinds of labor (*Petit v. Minnesota*, 177 U. S. 164, 168); between 'immigrant agents' engaged in hiring laborers to be employed beyond the limits of a state and persons engaged in the business of hiring for labor within the State (*Williams v. Fears*, 179 U. S. 270, 275); between sugar refiners who produce the sugar and those who purchase it (*American Sugar Refining Co. v. Louisiana*, supra). More directly applicable are recent decisions of this court sustaining hours of labor for women in hotels but omitting women employees of boarding houses, lodging houses, etc. (*Miller v. Wilson*, supra, at p. 382); and limiting the hours of labor of women pharmacists and student nurses in hospitals but excepting graduate nurses. (*Bosley v. McLaughlin*, supra, at pp. 394-396.) The opinion in the first of these cases was delivered by Mr. Justice Hughes, who, after pointing out that in hotels women employees are for the most part chambermaids and waitresses; that it cannot be said that the conditions of work are the same as those which obtain in the other establishments; and that it is not beyond the power of the legislature to recognize the differences, said (pp. 383-384):

> " 'The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. (*Patsone v. Pennsylvania*, 232 U. S. 138, 144.) It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may "proceed cautiously, step by step," and "if an evil is specially experienced in a particular branch of business" it is not necessary that the prohibition "should be couched in all-embracing terms." (*Carroll v. Greenwich Insurance Co.*, 199 U. S. 401, 411.) If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. (*Keokee Coke*

Co. v. Taylor, 234 U. S. 224, 227.) Upon this principle, which has had abundant illustration in the decisions cited below, it can not be concluded that the failure to extend the act to other and distinct lines of business, having their own circumstances and conditions, or to domestic service, created an arbitrary discrimination as against the proprietors of hotels.' " (*l. c.* 296-298.)

All manufacturers of food products are equally subject to the Industrial Court law, so far as it is valid. All packing houses within the state of Kansas equally come within its provisions. The order in question applies only to the plant of the plaintiff in error for the manifest reason that only in that plant was it necessary to invoke the provisions of the act in order to protect the workers' health.

At the time of the order in question an eight-hour day was in effect in all of the large packing plants in the state. Had unreasonably long hours of labor been instituted in any other plants, the Industrial Court would have considered a complaint on that subject and fixed a reasonable limit on hours of labor, just as it did in plaintiff in error's plant. The law operated equally in all such cases.

The administrations of the Interstate Commerce Act and State Public Utility Acts afford appropriate illustrations. The Interstate Commerce Act applies equally to interstate carriers, and in any case where rates are unreasonably high or otherwise unlawful, the commission, on complaint, will reduce the same. But a carrier whose rates have thus been reduced cannot complain because the rates of some other carrier have not been affected. The commission may fix the rates of all carriers at one time, or it may fix only the rate of one carrier at one time, without thereby making its order unconstitutional. Likewise, the Court of Industrial Relations may fix hours of labor at one plant at one time, or it may fix hours in all plants at the same time. The same is true of the rates of a street-car company, electric-light company or telephone

company under the various state public utility acts. No doubt many public utilities in the various states have never had their rates changed by the commission, but other utilities whose rates have been affected cannot complain of a denial of the equal protection of the laws when all utilities are governed by the same act.

The brief of plaintiff in error suggests that while a state might by general law fix the hours of labor in certain industries, that it cannot do so by an administrative tribunal. This objection has been set at rest by numerous decisions of this court.

"When a subject requires legislation for the regulation of future conduct, but the objects of it are so diffuse and variable that they cannot be distinctly apprehended and comprised in the ordinary terms of legislative classification, it is not unusual to prescribe general rules, if such do not already exist, and delegate the power to apply those rules to the varying circumstances which may arise and give occasion for control. The necessity of legislation in such form justifies its adoption; and it is not obnoxious to the constitution, in that it delegates legislative power. (*Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *Buttfield v. Stranahan*, 192 U. S. 476, 24 Sup. Ct. 349, 48 L. Ed. 425; *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523.)"

Louisville & N. R. Co. v. Interstate Commerce Commission, 184 Fed. 122.

But the Supreme Court of Kansas has decided that the state can fix the hours of labor through the instrumentality of a subordinate tribunal. This court in its opinion by Chief Justice Taft said that the Kansas Supreme Court's construction of the operation and effect of the act is controlling. The only question, therefore, for this court to consider is not whether the state restricted hours of labor directly by its legislature or through an administrative tribunal, but whether the restrictions thus imposed violated the constitutional provision requiring due process of law.

Regulations of working conditions and of health conditions are

generally left to the determination of administrative boards or officers in the various states. Such boards act upon the facts as they are presented, and issue orders which establish safe and healthful conditions in the particular cases. Such orders have the force and effect of a law.

This principle has been approved in a uniform line of decisions of this court, examples of which are found in the cases of *Wayman v. Southard,* 10 Wheat. 1, 43, 45, 46, 6 L. Ed. 253, 262, 263, in which Chief Justice Marshall said that although Congress could not delegate to the courts or to other tribunals powers strictly and exclusively legislative, yet it may delegate to others powers which the legislature might rightly exercise itself; *Marshall Field & Co. v. Clark,* 143 U. S. 649, 680, 683, 691, 692, 36 L. Ed. 294, 306, 307, 309, 310, holding that section of the McKinley Tariff Act providing for the imposition in a named contingency (to be determined by the President) of duties upon certain articles which the acts had placed on the free list, does not constitute a delegation of legislative power; *Butfield v. Stranahan,* 192 U. S. 470, 496, 48 L. Ed. 525, 535, holding an act of Congress prohibiting the importation of impure and unwholesome tea and providing that the Secretary of the Treasury should appoint seven tea experts to determine the standards of purity, was not invalid as a delegation of legislative power; *Union Bridge Co. v. United States,* 204 U. S. 364, 51 L. Ed. 523, holding that legislative and judicial powers are not unconstitutionally delegated to the Secretary of War by provisions of the River and Harbor Act giving him authority to determine whether certain bridges are unreasonable obstructions to navigation, and to make orders for their removal accordingly; *United States v. Atchison, Etc., Ry. Co.,* 234 U. S. 486, 58 L. Ed. 1422, holding amendment of 1910 to Interstate Commerce Act giving the commission power to determine necessity of a lower rate for longer than for shorter haul is

not void as an improper delegation of power; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 215, 56 L. Ed. 737, holding a statute giving the Interstate Commerce Commission power to require accounts to be kept by carriers in a uniform manner specified by the commission is not invalid.

D.

Hours of labor in packing plants are a proper subject for regulation under the police power.

It is so well settled that a state may regulate hours of labor in industries where work of long-continued duration is detrimental to the health of the workers, that we would consider it unnecessary to renew our discussion of that subject were it not for the appeal of the plaintiff in error that this court overrule its decision in *Bunting v. Oregon,* supra, and similar cases.

In *Holden v. Hardy*, 169 U. S. 366, 43 L. Ed. 780, this court held valid a state law establishing an eight-hour day in all mines and smelters regardless of the sex of the workers, and in *Bunting v. Oregon*, 243 U. S. 426, 61 L. Ed. 830, this court upheld the Oregon law establishing a ten-hour day in all mills, factories and manufacturing establishments, and providing that employees might work overtime not to exceed three hours in any one day on condition that payment be made for such overtime at the rate of time and one-half of the regular wage.

With reference to the provisions for time and one-half, Mr. Justice McKenna, in delivering the opinion, said:

"There is a certain verbal plausibility in the contention that it was intended to permit thirteen hours' work if there be fifteen and one-half hours' pay, but the plausibility disappears upon reflection. The provision for overtime is permissive, in the same sense that any penalty may be said to be permissive. Its purpose is to deter by its burden, and its adequacy for this was a matter of legislative judgment, under the particular circumstances. It may not achieve its end, but its insufficiency can not change its character from pen-

alty to permission. Besides, it is to be borne in mind that the legislature was dealing with a matter in which many elements were to be considered. It might not have been possible, it might not have been wise, to make a rigid prohibition. We can easily realize that the legislature deemed it sufficient for its policy to give to the law an adaptation to occasions different from special cases of emergency for which it provided—occasions not of such imperative necessity, and yet which should have some accommodation, abuses prevented by the requirement of higher wages. Or even a broader contention might be made that the legislature considered it a proper policy to meet the conditions long existent by a tentative restraint of conduct rather than by an absolute restraint, and achieve its purpose through the interest of those affected rather than by the positive fiat of the law.

"We cannot know all of the conditions that impelled the law or its particular form. The supreme court, nearer to them, describes the law as follows: 'It is clear that the intent of the law is to make ten hours a regular day's labor in the occupations to which reference is made. Apparently the provisions permitting labor for the overtime on express conditions were made in order to facilitate the enforcement of the law, and in the nature of a mild penalty for employing one not more than three hours overtime. It might be regarded as more difficult to detect violations of the law by an employment for a shorter time than for a longer time. This penalty also goes to the employee in case the employer avails himself of the overtime clause.'

"But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise, or be convinced of the wisdom of its exercise. (*Rast v. Van Deman & L. Co.*, 240 U. S. 342, 365, 60 L. ed. 679, 690, L. R. A. 1917 A, 421, 36 Sup. Ct. Rep. 370.) It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government; and that it is not as complete as it might be, not as rigid in its prohibitions as it might be, gives, perhaps evasion too much play, is lighter in its penalties than it might be, is no impeachment of its legality. This may be a blemish, giving opportunity for criticism and difference in characterization, but the constitutional validity of legislation can not be determined by the degree of exactness of its provisions or remedies. New policies are usually tentative in their beginnings, advance in firmness as they advance in acceptance. They do not at a particular moment of time

spring full-perfect in extent or means from the legislative brain. Time may be necessary to fashion them to precedent, customs and conditions, and as they justify themselves or otherwise they pass from militancy to triumph or from question to repeal.

"But passing general considerations and coming back to our immediate concern, which is the validity of the particular exertion of power in the Oregon law, our judgment of it is that it does not transcend constitutional limits. . . ." (*l. c.* 436, 437, 438.)

The Wolff Packing Company is a manufacturing establishment, and one in which the work is unusually and extremely arduous. The work is performed under the most trying conditions. Extremes of heat and cold, steam, water, blood and entrails, clock-work movement highly speeded, constitute working conditions which make long-continued hours detrimental to the health of the workers. *Bunting v. Oregon* is ample authority for the regulation of hours in such an industry.

There intervenes between the Holden case and the Bunting case the decision in *Lochner v. New York*, 198 U. S. 45, holding invalid a New York statute restricting the employment of persons in bakeries to ten hours in any one day. Counsel for plaintiff in error now seizes this Lochner case and holds it before the court as authority for the invalidity of all legislation dealing with hours of labor, notwithstanding the Holden and Bunting cases; although Chief Justice Taft, in *Adkins v. Children's Hospital*, 261 U. S. 525, 67 L. Ed. 785, stated in his dissenting opinion that he had always supposed the Lochner case to have been overruled by the Bunting case, *sub silentio* (*l. c.* 564). *Bunting v. Oregon* was not modified by *Adkins v. Children's Hospital*, supra, and the majority of this court had no difficulty in reconciling the Bunting case with its decision. In *Radice v. New York*, 264 U. S. 292, this court, by a unanimous opinion, upheld a statute prohibiting night work for women in restaurants, citing *Holden v. Hardy* as authority therefor, and holding that *Adkins v. Children's Hospital* was inapplicable.

We quote from the opinion of Mr. Justice Sutherland in the Radice case:

"Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state legislature here determined that night employment of the character specified, was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination. *Holden v. Hardy*, 169 U. S. 366, 395.

. . . . . .

"*Adkins v. Children's Hospital*, 261 U. S. 525, is cited and relied upon; but that case presented a question entirely different from that now being considered. The statute in the Adkins case was a wage-fixing law, pure and simple. It had nothing to do with the hours or conditions of labor." (*l. c.* 294, 295.)

It will be noted from the above quotation that "hours" are classified with "conditions of labor" and not with "wages."

In *Bunting v. Oregon*, supra, which was decided in 1917, the court said, with reference to the ten-hour day:

"There is a contention made that the law, even regarded as regulating hours of service, is not either necessary or useful 'for preservation of the health of employees in mills, factories, and manufacturing establishments.' The record contains no facts to support the contention, and against it is the judgment of the legislature and the supreme court, which said: 'In view of the well-known fact that the custom in our industries does not sanction a longer service than ten hours per day, it cannot be held, as a matter of law, that the legislative requirement is unreasonable or arbitrary as to hours of labor. Statistics show that the average daily working time among workingmen in different countries is, in Australia, 8 hours; in Britain, 9; in the United States, 9¾; in Denmark, 9¾; in Norway, 10; Sweden, France and Switzerland, 10½; Germany, 10¼; Belgium, Italy and Austria, 11; and in Russia, 12 hours." (*l. c.* 438, 439.)

But since 1917 the statistics given in the above decision (for the United States at least) have varied materially, and the eight-hour day now holds the place in industry that was then occupied by the ten-hour day.

In the Monthly Labor Review of August, 1922, volume 15, No. 2, published by the Bureau of Labor Statistics of the United States, Department of Labor, it is shown that in 1909 only 7.9 per cent of the employees in manufacturing industries in the United States worked 48 hours or under; in 1914, 11.8 per cent of such employees worked 48 hours or under; while in 1919, 48.6 per cent of the employees in all manufacturing industries of the United States worked 48 hours per week or less. This conclusively shows that during the period from 1914 to 1919 almost half the employees in manufacturing establishments gained the eight-hour day, and this situation has not materially changed to the present time.

The Court of Industrial Relations has found the fact that prolonged hours of labor are detrimental to the health of the worker, and to the public welfare, in the plant of plaintiff in error, and this finding is supported by the evidence in the record, and has been approved by the Kansas Supreme Court. This finding is entitled to the same consideration given that of the legislature in *Holden v. Hardy*, *Bunting v. Oregon*, and *Radice v. New York*, supra.

In the first opinion of this court in this case, Mr. Chief Justice Taft said:

"In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public." (*l. c.* 538.)

The above language, we believe, supports the right of the state to regulate the business of plaintiff in error to protect the health

of workers in congested masses, which surely includes the regulation of hours of labor.

But the validity of the order in question concerning hours does not depend in any respect on the public interest or lack of public interest in the meat-packing industry. This was important on the question of wages, but not as to hours of labor. In neither the Holden, Bunting nor Radice cases, cited above, was the nature of the business considered except its effect on the health of the worker, and practically all the industries affected thereby were impressed with no public interest whatever, and certainly not as much as is conceded to the packing industry in the first decision of this case. The statute in the Holden case established an eight-hour day for men, and the statute in the Bunting case established a ten-hour day for men in manufacturing industries, with time and a half for overtime after ten hours. The latter was held an hours-of-labor act and not a wage-fixing act.

Hours of labor is a proper subject for regulation in any industry where prolonged hours are detrimental to the health of the workers, and we are dealing with such an industry, as found by the Industrial Court and the State Supreme Court upon the undisputed evidence in this case.

Complaint is made of paragraph 19 of the order of the Industrial Court which provides for one day's rest out of seven. This provision is constitutional and is within the police power of the state. The universal need of one day of rest out of seven has been recognized by this court. (*Petit v. State of Minnesota*, 177 U. S. 164.)

E.

The portions of the statute relating to hours are valid despite the invalidity of the wage-fixing provisions.

In the case of *Dorchy v. Kansas*, supra, this court held that it was the duty of the state court to determine whether the provisions of the statute are separable. Afterwards, in the same case, the Kansas Supreme Court held that the Industrial Court law was severable. The state court has decided in this case that the provisions of the statute and of the order in question relating to hours of labor and overtime are not dependent upon the wage-fixing provisions for their validity, and that they are separable from these wage-fixing provisions and have the same effect as an independent statute.

Section 28 of the Industrial Court act is as follows:

"If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court." (R. S. 44-628.)

This section has been interpreted by the Supreme Court of Kansas several times. In *State v. Howat*, 107 Kan. 423, Alexander Howat and three others were adjudged guilty of contempt in failing to obey an order of the district court requiring them to appear as witnesses before the Court of Industrial Relations in an investigation to be conducted by it relating to the conditions existing in the mining industry in Cherokee and Crawford counties. A great many questions were raised by defendant in that case concerning other provisions of the statute than that invoked against them, and the State Supreme Court disposed of these collateral objections, after quoting section 28, as follows:

"The rule is familiar that a part of a statute which is unobjectionable in itself may be enforced notwithstanding another part is ad-

judged unconstitutional, if it appears that the void portion was not an inducement to the enactment of the rest—that the legislature desired the unobjectionable part to become a law irrespective of the validity of the remainder. Here the express declaration disposes of any possible doubt that might otherwise exist as to the legislative intent, and requires the court to give effect to all portions of the statute that do not in themselves violate some constitutional provision."

In *State, ex rel., v. Howat*, 109 Kan. 376, 198 Pac. 686, the Supreme Court of Kansas, referring to section 28, said:

"Understanding the pioneer character of its work, the legislature framed the statute so that any invalid provision—not section (only), but provision (section 28)—may be eliminated without affecting others. This rule of interpretation extends to application of the same provision to different subjects." (p. 416.)

After the application of the same rule to this case in the State Supreme Court it has again been applied in the second decision in the Dorchy case (*The State v. Howat, et al., August Dorchy, appellant*, 116 Kan. 412, decided July 5, 1924), where the court sets out the history of the enactment of the law and section 28 and holds that section 19 is valid, notwithstanding the invalidity of the wage-fixing provisions. It said with reference to section 28:

"The legislature selected language which, if read literally, declared that to be its purpose, when it said that, if any section or provision should be found invalid, it should be conclusively presumed the rest of the act would have been passed without it. To avoid this effect it is necessary to read an exception into the act by interpretation, because of the intimate relation between forbidding strikes and furnishing another remedy for the wrongs against which they might be directed. The very fact that such relation must have been present to the mind of the legislature suggests that, if the exception had been intended, it would have been expressed. The conclusion is that, because of the provisions of section 28, section 19 is to be regarded as having the legal effect of an independent statute, making it a punishable offense for an officer of a labor union, acting in his official capacity, to call a strike of coal miners."

There is no inconsistency between these decisions and the case of *Hill v. Wallace*, 259 U. S. 44, 76, 72, 66 L. Ed. 822, 831, where this court found invalid certain sections of the futures trading act (ch. 76, 42 Stat. at L. 178), and likewise found other sections invalid because so interwoven with the invalid regulations that they could not be separated, notwithstanding a severability provision in the act. Certain regulations of boards of trade were to be made under the act, and when in effect the tax imposed by section 4 was not to be collected. This court held that tax was void. The regulations, being thus dependent upon the tax provision, fell with it.

The severability provision is as follows:

"If any provision of this act, or the application thereof, to any person or circumstances is held invalid, the validity of the remainder of the act and of the application of such provision to other persons or circumstances shall not be affected thereby."

The court found that to give validity to section 4, in view of the invalidity of other sections, it would be necessary to amend the act, citing *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563, where the court held that it could strike out or disregard invalid words, but could not insert in their place new language to meet the situation, and thus amend the act.

Such action is not necessary in this case. All that is necessary, and all that has been done by the State Supreme Court, is to strike out the invalid word "wages" and the invalid provisions relating to wages only. Thus, without the slightest change in the language of the act, except striking out the invalid words "and a reasonable minimum wage or standard of wages," the pertinent part of section 8, upon which the order is directly based, reads as follows:

"The Court of Industrial Relations shall order such changes, if any, as are necessary to be made in and about the conduct of said industry, employment, utility or common carrier, in the matters of working and living conditions, hours of labor, rules and practices

(and a reasonable minimum wage or standard of wages) to conform to the findings of the court in such matters, as provided in this act, and such orders shall be served at the same time and in the same manner as provided for the service of the court's findings in this act."

An important distinction between this case and the cases of *Hill v. Wallace* and *United States v. Reese*, is that in both of those cases a federal statute was involved, and it was the primary duty of this court to decide whether such statutes were severable. But in the case at bar a state statute is involved, and the duty of determining its severability falls upon the state court, and the state court has held the statute to be severable.

In this connection see also:

Ohio Tax Cases, 232 U. S. 576, 594; 58 L. Ed. 737.

Keller Potomac Electric Power Company, 261 U. S. 428; 67 L. Ed. 731, 737.

Board of Trade of the City of Chicago v. Olsen, 262, U. S. 1, 42; 67 L. Ed. 839, 852, 853.

State, ex rel., v. Carter, 174 Ala. 266, 273, 274; 56 So. 977.

Snetzer v. Gregg, 129 Ark. 542; 96 S. W. 925; L. R. A. 1917 F, 999, 1002.

Sallee v. Dalton, 138 Ark. 549, 213 S. W. 762, 764.

Bonner v. Jackson, 158 Ark. 526, 251 S. W. 1, 4.

In re Schuler, 167 Cal. 282; 139 Pac. 685; Ann. Cas. 1915 C, 706, 710.

Gulf Refining Company of Louisiana v. McFarland, —— La. ——; 97 So. 433.

In re Questions of the Governor, 55 Colo. 17, 21, 22.

LaJoie v. Milliken, 242 Mass. 508; 136 N. E. 419.

Shea v. North Butte Mining Company, 55 Mont. 522, 179 Pac. 499, 504.

Saari v. Gleason, 126 Minn. 378, 384, 385.

American Express Company v. Beer, 107 Miss. 528; 65 So. 575 Ann. Cas. 1916 D, 127, 130.

Enochs v. State, —— Miss. ——; 97 So. 534, 576.

State v. Elba Bank and Trust Company, 18 Ala. App. 253, 256; 91 So. 917, 919; 207 Ala. 711.

Hines v. Forman, —— Tex. Com. App. ——; 243 S. W. 479, 482.
Clark v. Finley, 93 Tex. 171, 176, 177; 54 S. W. 343.
Borgnis v. Falk Co., 147 Wis. 327; 133 N. W. 209; 37 L. R. A., n. s., 489, 496, 501.

F.

The order affects women as well as men.

The employees of the Wolff Packing Company affected by the order were partly women, and the provisions concerning hours of labor applied to them as well as to the men employed, and the authority to fix hours of labor for women is recognized by this court in the Radice case as well as the uniform line of decisions cited therein. Plaintiff in error has appealed from the order as a whole, in so far as it affects the women employees as well as the men.

G.

Freedom of contract as to hours of labor.

Freedom of contract as to hours and conditions of labor has had to yield to the governmental power where the police power has prescribed: Eight-hour day as basic day, with overtime thereafter (*Wilson v. New*, 243 U. S. 332). Ten-hour day in mills, factories and manufacturing establishments, and time and a half for overtime (*Bunting v. Oregon*, 243 U. S. 426). Sixteen hours continuous service on railroads (*B. & O. R. Co. v. I. C. C.*, 221 U. S. 612; *M. K. & T. v. U. S.*, 231 U. S. 112). Eight hours per day in mines and smelters (*Holden v. Hardy*, 169 U. S. 366). Maximum hours of labor for women (*Mueller v. Ore.*, 208 U. S. 412; *Bosley v. McLaughlin*, 236 U. S. 385; *Miller v. Wilson*, 236 U. S. 373; *Riley v. Mass.*, 232 U. S. 671). Eight-hour day on public work (*Atkin v. Kansas*, 191 U. S. 207). Liability for injury under workmen's compensation act, regardless of question of negligence (*Arizona Copper Co. v. Hammer*, 250 U. S. 400; *New York Central Ry. Co. v. White*, 243 U. S. 188, 61 L. Ed. 667; *New York Central Ry. Co. v. Bianc*,

250 U. S. 596). The time and place of paying seamen's wages (*The Bark Eudora*, 190 U. S. 169).

See, also:

Central Lumber Co. v. South Dakota, 226 U. S. 157; 57 L. Ed. 164.

Middleton v. Texas Power and Light Co., 249 U. S. 152; 63 L. Ed. 527, 534.

German Alliance Insurance Co. v. Lewis, 233 U. S. 389; 58 L. Ed. 1011.

National Safety Deposit Co. v. Stead, 232 U. S. 58; 58 L. Ed. 504, 511.

Manigault v. Ward Co., 199 U. S. 472; 50 L. Ed. 274.

Grand Trunk W. R. R. Co. v. Railroad Commissioners of Indiana, 221 U. S. 400; 55 L. Ed. 786.

This yielding of freedom of contract as to working conditions is also exemplified in the various factory acts and safety-appliance acts which have been sustained, but as to which citation of authority is unnecessary.

H.

The act is not invalid because it operates only when there is a controversy.

Nor is the Kansas Court of Industrial Relations statute invalid because it operates only when there is a controversy, or as expressed by plaintiff in error:

"All of the packing houses in Kansas may, so far as this statute affects their business, enter into contracts with their employees for more than eight hours' work each day, and the liberty of such packing-house owners and their employees in respect of such contracts is unimpaired by this statute until and unless such controversy arises."

This does not affect the validity of the act. The legislature may lawfully restrict the operation of the statute to cases where there is an actual necessity for such regulation, and it is clear that no pernicious practices as to hours of labor can long exist without a controversy concerning the same, if the condition is so bad as to justify

interference under the police power. The law is more flexible in its operation on account of the provision complained of, and has less tendency to disturb existing practices which are not detrimental to the public health. As stated above, it is similar in this respect to the Interstate Commerce Act and various public utility acts where a rate is left undisturbed until complaint is made of the same, and no jurisdiction attaches without such complaint.

No doubt the Kansas legislature could have prescribed hours of labor in all manufacturing establishments, as did the Oregon legislature in the Bunting case. But its failure to do so, and proceeding along a different line, does not make the regulation invalid unless other reasons exist for its invalidity. As Mr. Justice Hughes stated in *Miller v. Wilson*, 236 U. S. 373:

"It (the legislature) is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibition 'should be couched in all-embracing terms.'"

The above language is quoted with approval in *Radice v. New York* supra (*l. c.* 297, 298). The Kansas Court of Industrial Relations, under the act in question, is authorized to proceed, and has proceeded cautiously, step by step, rather than by a sweeping regulation of the industry as a whole. The legislature has the authority to limit its power in this manner to cases where an actual controversy exists.

IV.

The Claim of Confiscation is Not Well Founded.

A.

The fact that an industry is doing business at a loss cannot defeat a proper exercise of the police power.

If a state may regulate hours of labor it can do so without regard to the financial condition of the business affected; likewise, if the regulation is invalid, the most prosperous business cannot be regulated any more than the weak one.

Regulation of hours of labor is under the police power, and the police power, when lawfully exercised, is not concerned with the financial status of a private industry.

The regulation of hours involved in the case of *Holden v. Hardy*, supra, applied to all mines and smelters in the state. Some of them were no doubt prosperous, some doing business at a loss, but the act applied to all equally. This is true of the regulation in *Bunting v. Oregon*, which applied to all mills and manufacturing plants in the state. It is true in every case where an attempt has been made to regulate the conduct of a private industry.

Statutes and orders fixing rates which an industry may charge for its product are the only exception to this rule, and this exception is based on the fact that the thing they regulate is the income of the industry and not the necessary expense of complying with the law.

In all cases where an exercise of the police power was challenged, and the point of the loss to the individual has been raised, it has been decided adversely to such contention (except in price-fixing cases). Examples of this are *Mugler v. Kansas*, 123 U. S. 623, 664, 8 Sup. Ct. 273, where the loss to an individual was held not to invalidate a statute prohibiting the manufacture of liquor. *California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 199 U. S. 306,

26 Sup. Ct. 100, holding that the state is not compelled to compensate individual owners for pecuniary losses sustained by reason of restrictions on their business; *Hadacheck v. Sebastian*, 239 U. S. 394, 36 Sup. Ct. 143, holding valid an ordinance prohibiting the operation of a brickyard within a certain area, although no compensation was awarded to the owner for the value of his plant so located; *Hebe Co. v. Shaw*, 248 U. S. 297, 39 Sup. Ct. 125, sustaining an Ohio statute prohibiting the sale of condensed skim milk, although the business of the Hebe Co. in Ohio was thereby destroyed; *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, 34 Sup. Ct. 364, holding that the state may lawfully require a railroad to limit the use of its property and to expend money in paving and other improvements; and numerous other cases.

The law upon this question is simple. Hours of labor are properly subject to the exercise of the police power of the state, and the financial condition of the individual employer affected thereby is immaterial.

B.

The plaintiff in error has proven no operating loss due to limitation of the hours of labor of its employees.

(The references under this subheading are to the record in case No. 739, October term, 1922.)

Referring to the alleged loss in plaintiff in error's plant, the Supreme Court of Kansas said:

"The defendant is operating its plant at a loss. Why, does not appear from the evidence. At least, this court is unable to determine why, and for the purpose of this discussion it is unnecessary to ascertain why. The plant may be badly located on account of transportation facilities. There may have been managerial mismanagement. A part of the money arising out of the operation of this plant may have been taken by the Allied Packers and used in the operation of the other plants conducted by them. It may have been that

the loss was due to unstable conditions in live-stock and meat markets prevailing during the time covered by the investigation of the Court of Industrial Relations." (R. 151.)

The commissioner had previously made a finding that the plaintiff's plant was being operated at a loss, but under the Kansas practice there is no presumption in favor of the findings of the commissioner when excepted to, and the Supreme Court in such case reexamines the facts (*State, ex rel., v. Foley,* 107 Kan. 608), so the above quoted portion of the Supreme Court decision is the only judicial determination of a loss in its plant upon which plaintiff in error can rely.

In *Chicago and Grand Trunk Railway Co. v. Wellman,* 143 U. S. 339, 36 L. Ed. 176, this court said:

"It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'

"We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and

how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts."

To the same effect see:

Simpson v. Shepard (Minnesota Rate Case), 230 U. S. 351; 57 L. Ed. 1511.

City of Knoxville v. Knoxville Water Co., 212 U. S. 1; 53 L. Ed. 371.

Railroad Commission v. Cumberland Telephone & Telegraph Co., 212 U. S. 414; 53 L. Ed. 577.

Reagan v. Farmers Loan and Trust Co., 154 U. S. 362; 38 L. Ed. 1014.

The burden was upon the Packing Company to establish that the order of the Industrial Court was confiscatory. The bare presentation of evidence showing deficits in operation is not proof of confiscation. It is essential to show economical and efficient operation.

The Packing Company not only failed to make such proof, but its evidence tended to show that its claim of deficits was unfounded.

The accounting figures submitted by it at the hearing were prepared by Ernst & Ernst, accountants. In their report of February 25, 1921, to the board of directors and stockholders of the Packing Company they state:

"At the date of our examination we found the accounts-receivable records in a deplorable condition, and we were advised that the general ledger control had been partly built up from postings to customers' ledger, instead of being compiled from the original records. We found that numerous entries had been made to the control account, presumably to adjust same to the aggregate amount of the individual accounts at various dates; one of these entries amounting to $33,207.93 being credited to 'sales adjustment' account under date of October 18, 1920, with the explanation 'to bring the accounts receivable control to meet the figures shown to be a correct balance.' We noted further that the control account was credited with the amounts of $7,500 and $6,500 at different dates, to cover estimated returns and allowances, and all of these amounts, together with sundry other discrepancies located by us, have been

applied as adjustments of sales and allowances as shown by the books.

"In addition to the amounts above specifically commented upon, numerous other adjustments were made in the control account during the six months' period ended October 30, 1920, and we are submitting herewith reconcilement of the book balances with the aggregate customers' accounts receivable stated on balance sheet." (R. 224.)

"We have hereinbefore commented upon the condition of the records with particular reference to customers' accounts, and attention is directed to the fact in general we found the accounting records of the company in a very unsatisfactory condition. We noted, however, that at the time of our examination the accounting department was under the direct supervision of a representative of the Chicago office of the Allied Packers, Incorporated, and were advised that the prevailing conditions would be promptly remedied." (R. 226.)

H. E. Smith, who supervised the examination of the books of the Packing Company by Ernst & Ernst, for the purpose of making these statements of accounts, said that the substance of the above comments were made because the accountants could not safeguard accuracy and satisfy themselves, and to tell the board of directors and stockholders the conditions the accountants found the records in; that it was part of their audit. (R. 90, 91.)

In the latter part of 1920 and first part of 1921 allowances to customers were excessive. (R. 74.)

In the statement introduced on behalf of the Packing Company of income and expense, January 17 to April 30, 1921, appeared as expenses the items of bond interest, $5,805.90; central-office administration, $12,562.81; central-office pay roll, $5,452.77; depreciation, $23,910.00. (R. 241.) The commissioner rejected the first three of these items and reduced the item for depreciation to one-third of the amount of that claimed by the Packing Company. (Finding No. 8, R. 122, 123.)

The bonded interest was the proportion paid by the Packing Company upon bonds issued by the Allied Packers, Incorporated, which owned most of the stock of the Packing Company. The central-office administration and central-office pay roll were expenses incurred in the conduct of the offices at Chicago of the Allied Packers, Incorporated.

Also an excessive allowance was made for depreciation, and this was criticized by the commissioner in his Finding No. 8. (R. 123.)

Charles Wolff, president of the Packing Company, testified at the hearing before the Industrial Court that in October, 1919, the Allied Packers, Incorporated, bought about ninety per cent of the stock of the Packing Company; the capital stock then was $600,000 (R. 200, 201); that the value of the plant was about the amount of the capital stock. The Allied Packers, Incorporated, paid $130 a share of par $100 for this stock (R. 66). This was upon a basis of the total value of the capital stock of $740,000. Mr. Wolff stated at the subsequent hearing before the commissioner that the value of the plant as ascertained by the American Appraisal Company was about $1,000,000 (R. 209, 210, 65). The valuation by that company was that on which the Packing Company relied in this case (balance sheet following R. 226). By that balance sheet a valuation was claimed of $1,298,310.06. These matters throw doubt upon the assertions of the Packing Company that it had a deficit in 1919 and 1920, and would have incurred a loss if the hours and overtime order of the Court of Industrial Relations had been put into effect.

A paper loss was shown by the books of the company, but the accountant who testified to the same reported that these books were in such deplorable condition that he could not arrive at any positive determination from them, and this firm of accountants did not certify to the correctness of that report.

The Industrial Court carefully considered the effect of irregularity

of receipts of live stock and allowed a maximum of nine hours a day on two days in the week to meet this situation, provided the total maximum hours per week did not exceed forty-eight.

Respondent's claim in this respect is similar to that which has been made in every industry whenever any suggestion is made looking toward reducing long working hours or other improvement of conditions. When necessary to do so the employer has always succeeded in shortening the working days or improving working conditions. The vigorous assertions that the working day could not be reduced below twelve or ten hours have always been proven to have been unfounded.

At the time of the order of the Court of Industrial Relations of May 2, 1921, the large packing plants of the country had been operating under the eight-hour day since May 5, 1918. From June 1, 1920, to January 17, 1921, the date when the Wolff Packing Company changed to longer hours, its plant had been operated on the eight-hour day. The order of the Court of Industrial Relations allowed a nine-hour day two days in the week without overtime, but provided that if an employee worked more than forty-eight hours in the week he should be allowed time and a half pay for overtime. The nine-hour day two days in the week gave the opportunity to the Wolff Packing Company to adjust its operations to variations in the deliveries to it of live stock. The evidence of Mr. Sheehan, the superintendent of the plant, made it obvious that the Packing Company could adapt its operations to this order as to hours. There was no evidence of any serious or continued effort by the packing company to induce its shippers to regulate the time of deliveries of live stock.

CONCLUSION.

For the reasons given, we submit the decision of the Supreme Court of Kansas should be affirmed.

Respectfully submitted,

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APPENDIX.

There is printed as an appendix to the brief for the plaintiff in error a copy of the "Special Appearance of Defendant to Plaintiff's Motion for Rehearing and Modification of Judgment entered in this Cause on October 6, 1923," filed in the Supreme Court of Kansas.

On one point referred to in that special appearance we quote from the reply brief for plaintiff filed in the Supreme Court of Kansas in reply to that special appearance:

"I.

"A conversation is mentioned, in the special appearance of defendant to the above motion, at pages 2 and 3, between Mr. D. R. Hite and Mr. John G. Egan, of about October 10, 1923. That conversation began with a telephone call from Mr. Hite to Mr. Egan, in which Mr. Hite stated, in substance, that he was preparing to obtain a writ of error in this case from the last judgment of this court, spreading the mandate from the United States Supreme Court, etc., and Mr. Egan made the statement set out in the special appearance, about the desirability of having the Wolff Packing Company case heard at the same time as the case of *The State v. Dorchy*, which was then expected to be reached for argument between November 20 and December 1, and of the request which it would be desirable to make by both parties to the United States Supreme Court to advance the hearing of the Wolff Packing Company case and have it heard on the same day as the case of *The State v. Dorchy*. Nothing was said in that conversation one way or the other about a motion for rehearing in this court, but it was not intimated that there would be no motion for rehearing filed in this court, and there was no request from Mr. Egan to have a writ of error obtained quickly; but his statement was confined to the desirability of having the case advanced in the Supreme Court of the United States, so it could be heard on the same day as the Dorchy case. The transcript was forwarded to Washington at the instance of Mr. Hite, after he was informed we wanted to file this motion."